92

Supreme Court, U.S.
FILED
071459 MAY 20 2008
OFFICE OF THE CLERK

No. (1)

IN THE

Supreme Court of the United States

HORACE MANN INSURANCE COMPANY, PETITIONER

v.

ENERAL STAR NATIONAL INSURANCE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DANIEL C. COOPER
JAMISON H. CROPP

Cooper Law Offices
240 West Main St
Bridgeport, WV 26330
(304)842-0505

DENNIS P. DERRICK
Counsel of Record

7 Winthrop Street
Essex, MA 01929
(978) 768-6610

Attorneys for Petitioner

CURRY & TAYLOR • (202) 393-4141

QUESTION PRESENTED

Has the court of appeals' misreading of unambiguous language in two excess insurance policies nullified substantive West Virginia law on the subject and created federal common law at odds with the State's statutory scheme for insuring public schools and their employees, undermining the reasonable expectations of coverage and subverting the concerns of comity and federalism expressed by this Court in *Erie R. Co. v. Tompkins*, 304 U.S. 64(1938) and its progeny?

RULE 29.6

The petitioner Horace Mann Insurance Company is a publicly held corporation which is a wholly owned subsidiary of its parent corporation, Horace Mann Educators Corporation, a Delaware corporation. Ariel Capital Management, LLC owns approximately 18.2% of the petitioner's parent corporation, Horace Mann Educators Corporation. No other publicly held corporation has a direct financial interest in the outcome of this case.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 29.6 ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

RELEVANT PROVISIONS INVOLVED 2

STATEMENT 5

REASONS FOR GRANTING THE PETITION 22

CONCLUSION 31

APPENDIX

Circuit Court Opinion 1a
District Court Memorandum Opinion & Order 40a
Corrected Order Denying Rehearing 69a

TABLE OF AUTHORITIES

Page

CASES

Alden v. Maine, 527 U.S. 706, 754(1999) 29
Allstate Insurance Co. v. American Hardware Mutual Ins. Co., 865 F.2d 592(4th Cir. 1989) 16
American Safety Indem. v. Stollings Trucking Co., 450 F. Supp. 639 (S.D.W.Va. 2006) 23
Bender v. Glendenning, 632 S.E.2d 330, 345(W.Va 2006) 23
Bergholm v. Peoria Life Ins. Co., 284 U.S. 489, 492(1932) 25
Bush v. Gore, 542 U.S. 692, 740-742(2000) 28, 30
Change, Inc. v. Westfield Ins. Co., 542 S.E.2d 475, 478(W.Va 2000) 25
Cox v. Amick, 466 S.E.2d 459, 468 (W.Va. 1995) 23
Deel v. Sweeney, 383 S.E.2d 92, 94(W.Va 1989) 22
Erie R. Co. v. Tompkins, 304 U.S. 64(1938) 28, 30
Felder v. Casey, 487 U.S. 131, 151(1988) 28
Ferens v. John Deere Co., 494 U.S. 516, 524(1990) 29
Gauze v. Reed, 633 S.E.2d 326, 333(W.Va 2006) 26
Guaranty Trust Co. York, 326 U.S. 99, 109(1945) 28
Hanna v. Plumer, 380 U.S. 460, 468(1965) 30
Horace Mann Insurance Co. v. Adkins, 599 S.E.2d 720, 724-725(W.Va 2004) 25, 27
Imperial Fire Ins. Co. v. Coos County, 151 U.S. 452, 463(1894) 23
Keffer v. Prudential Insurance Company of America, 172 S.E.2d 714, 715-716(W.Va 1970) 22, 23
Martin v. Rothwell, 95 S.E. 189, 190(W.Va 1918) 24
Meredith v. Winter Haven, 320 U.S. 228, 238(1943) 29
Michael O. Leavitt v. Jane L., 518 U.S. 137, 144-145(1996) 31
Mutual Ins. Co. v. Hurni Co., 263 U.S. 167, 174(1923) 25
National Mut. Inc. Co. v. McMahon & Sons, 356 S.E.2d 488, 495-496 & n. 6(W.Va 1987) 25
Progressive Paloverde Ins. v. Hartford Fire Ins., 356

F.3d 524, 529(4th 2004) 26
Ruhlin v. New York Life Ins. Co., 304 U.S. 202, 208-209(1938) 29
Salve Regina College v. Russell, 499 U.S. 225, 226(1991) 29, 30
Satterfield v. Property and Cas., 618 S.E.2d 483, 485-486(W.Va 2005) 23
Shamblin v. Nationwide Mut. Ins. Co., 332 S.E.2d 639, 642(W.Va 1985) 25
Six Companies v. Highway Dist., 311 U.S. 180, 188(1940) 29
State Bancorp v. U.S. Fidelity and Gaur., 483 S.E.2d 228, 233(W.Va.1997) 25
Stone v. National Surety Corporation, 125 S.E.2d 618,619-620 (1962) 22, 25
Tennant v. Smallwood, 568 S.E.2d 10, 13 n.7(W.Va 2002) 25
Tompkins, 304 U.S. 64 (1938) 22, 29
United States v. Kimbell Foods, Inc., 440 U.S. 715, 730(1979) 29
West v. A.T. & T. Co., 311 U.S. 223, 236-237(1940) 29

STATUTES

28 U.S.C. § 1254(1) 2
28 U.S.C. § 1332(a)(1) 3
28 U.S.C. § 2101(c) 2
W. Va. Code § 29-12-5a 3, 5, 20
W. Va. Code § 29-12-11 4
W. Va. Code § 29-12A-11(a)(2) 4
W. Va. Code § 29-12A-3(c) 4

OPINIONS BELOW

The published majority opinion of the United States Court of Appeals for the Fourth Circuit in *Horace Mann Insurance Company v. General Star National Insurance Company*, C.A. No. 06-2156, decided January 23, 2008, and reported at 514 F.3d 336(4th Cir. 2008), reversing the district court's order granting the petitioner's motion for summary judgment and ordering that a judgment enter declaring that the respondent's insurance policy is excess to the petitioner's insurance policy, is set forth in the Appendix hereto(App. 1-39).

The unpublished decision of the federal district court for the Northern District of West Virginia, Clarksburg Division, in *Horace Mann Insurance Company v. General Star National Insurance Company*, C.A. No. 1:04-CV-163, filed September 29, 2006, granting the petitioner's motion for summary judgment and declaring that the petitioner's insurance policy is unambiguously excess to the coverage provided by the respondent, is set forth in the Appendix hereto(App. 40-66).

The unpublished order of the United States Court of Appeals for the Fourth Circuit in *Horace Mann Insurance Company v. General Star National Insurance Company*, C.A. No. 06-2156, decided February 20, 2008, denying the petitioner's combined petition for rehearing or for rehearing *en banc*, is set forth in the Appendix hereto(App.67-68).

JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit reversing the district court's order granting the petitioner's motion for summary judgment and ordering that a judgment enter declaring that the respondent's insurance policy is excess to the petitioner's insurance policy, was entered on January 23, 2008; and its further order denying the petitioner's timely filed combined petition for panel rehearing or for rehearing *en banc* was filed and decided on February 20, 2008(App. 1-39;67-68).

This petition for writ of certiorari is filed within ninety (90) days of February 20, 2008. 28 U.S.C. § 2101(c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall...be deprived of life, liberty, or property, without due process of law....

United States Constitution, Amendment X:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

28 U.S.C. § 1332(a)(1):

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—
> (1) citizens of different States;...

W. Va. Code § 29-12-5a: Liability insurance for county boards of education, their employees and members, the county superintendent of schools, and for employees and officers of the state department of corrections.

> In accordance with the provisions of this article, the state board of risk and insurance management shall provide appropriate professional or other liability insurance for all county boards of education, teachers, supervisory and administrative staff members, service personnel, county superintendents of schools and school board members.... Said insurance shall cover any claim, demand, action, suit, or judgment by reason of alleged negligence or other acts resulting in bodily injury or property damage to any person within or without any school building...if, at the time of the alleged injury, the teacher, supervisor, administrator, service personnel employee, county superintendent, school board member,...was acting in the discharge of his duties, within the scope of his duties, position or employment, under the direction of the board of education...or in an official capacity as a county superintendent or as a school board member....Such insurance coverage shall be in an

> amount to be determined by the state board of risk and insurance management, but in no event less than one million dollars for each occurrence.
>
> In addition, each county board of education shall purchase, through the board of risk and insurance management, excess coverage of at least five million dollars for each occurrence....Any insurance purchased under this section shall be obtained from a company licensed to do business in this state....

W. Va. Code § 29-12-11:

> The provisions of this article are considered remedial and shall be liberally construed and interpreted so as to effect and accomplish the general purposes and objectives hereof. In the event any part or provision of the article be held to be unconstitutional by any court of competent jurisdiction, such holding and decision of the court shall not affect the validity and constitutionality of the remaining parts and provisions of the article.

W. Va. Code § 29-12A-3(c):

> (c) "Political subdivision" means any county commission, municipality and county board of education....

W. Va. Code § 29-12A-11(a)(2):

> (a)(2) Except as otherwise provided in this section, a political subdivision shall indemnify and hold harmless an employee in the amount of any judgment that is obtained against an

employee in a state or federal court...and that is for damages for injury, death, or loss to persons or property caused by the act or omission of such employee, if at the time of the act or omission the employee was acting in good faith and within the scope of his employment or official responsibilities.

STATEMENT

West Virginia Code § 29-12-5a, requires that all public school systems and public school employees in the state possess liability insurance in order to indemnify each of them against "any claim, demand, action, suit, or judgment by reason of alleged negligence or other acts resulting in bodily injury or property damage to any person within or without any school building...." Specifically, W. Va. Code § 29-12-5a, mandates that West Virginia's Board of Risk and Insurance Management purchase on behalf of public school systems and its public school employees at least one million dollars ($1,000,000) of primary liability insurance coverage for each covered occurrence together with an additional amount of excess insurance coverage of at least five million dollars ($5,000,000) for each covered occurrence(App. 32). The insurance companies providing this insurance must be licensed to do business in West Virginia. *Id.*

Consistent with this statutory mandate and in order to protect itself and its employees from liability for the 2002-2203 school year, the Lincoln County Board of Education in June of 2002 purchased from National Union Fire Insurance Company of Pennsylvania ("National Union") a primary liability

insurance policy in the amount of $1,000,000, such coverage to begin on or about July 1, 2002, and to continue until July 1, 2003(App. 32).

In order to comply with § 29-12-5a's mandate, the Board on or about June 6, 2002, purchased from the respondent General Star National Insurance Company ("the respondent" or "General Star") an excess policy for the same period of July, 2002 until July 2003, covering losses greater than $1,000,000 up to an additional $5,000,000(App. 32). The Lincoln County Board of Education paid the respondent General Star a total of $480,000 annually in premiums for this excess insurance coverage.

Acknowledging its status as the provider to the Lincoln County Board of Education of excess insurance coverage in the amount of $5,000,000 for any claims beyond National Union's underlying primary coverage of $1,000,000, General Star's excess insurance policy provides in pertinent part:

> **I. COVERAGE**
>
> The Company shall Indemnity [sic] the insured for **ultimate net loss** in excess of the **underlying insurance**. . . but not in excess of the Company's limits of liability [i.e., $5,000,000]. . . .
>
> **II. APPLICATION OF UNDERLYING INSURANCE**
>
> Except for the limits of liability and any provisions in the underlying insurance policy which are inconsistent with this Policy, including any endorsements attached hereto,

the terms conditions, agreements, definitions, exclusions and limitations of the **controlling underlying insurance policy** are incorporated by reference as a part of this Policy.

....

DEFINITIONS

1. **Controlling Underlying Insurance Policy**

   The term "Controlling Underlying Insurance Policy" means the insurance policy designated as such in Item 2 of the Declarations [i.e., the National Union's primary policy of $1,000,000].

....

5. **Ultimate Net Loss**

   The term "Ultimate Net Loss" means the total of all sums which the insured, or any organization as its insurer, or both, shall become legally obligated to pay, whether by reason of adjudication or settlement, because of an occurrence covered under the terms of the **controlling underlying insurance policy** and to which this Policy applies: ultimate net loss shall include costs, but shall not include recoveries, salvages or other insurance except underlying insurance or insurance written specifically to apply in excess of this policy whether collectible or not.

6. Underlying Insurance

The term "Underlying Insurance," means the primary or excess insurance policies contributing to the limit stated in Item 2 of the Declarations, including any deductible amount, insured's participation or self insured retention beneath any such policy, and includes any renewals or replacements thereof. The limits of such policies shall be deemed to be applicable regardless of (1) any defense which the underlying insurer may assert, (2) the insured's failure to comply with any condition of any such policy or (3) the insolvency of the underlying insurer.

CONDITIONS

....

(C) Other Insurance

If other valid and collectible insurance with any other insurer is available to the insured covering a loss also covered by this Policy, **other than insurance that is in excess of the insurance afforded by this Policy**, the Insurance afforded by this Policy shall be in excess of and shall not contribute with such other insurance[.] Nothing herein shall be construed to make this Policy subject to the terms, conditions, and limitations of other insurance, reinsurance or indemnity.

(App. 37;48-50)(emphasis in original and supplied).

The plain import of this language employed by General Star in its excess policy was that its undertaking to supply insurance coverage up to $5,000,000 to the Lincoln County Board of Education for covered occurrences was secondary to, or in excess of, National Union's primary insurance coverage of $1,000,000. Moreover, in its "Other Insurance" clause, General Star explicitly acknowledged that there could be *other* insurance "in excess of the insurance afforded by this Policy" which might be available but which would not alter its obligation to provide to the Board excess insurance coverage up to $5,000,000 for covered occurrences from July, 2002 until July 2003(App. 37;50).

After the Lincoln County Board of Education purchased this state-mandated excess liability insurance from the respondent General Star in June of 2002, the West Virginia Education Association voluntarily purchased a supplemental liability insurance policy from the petitioner Horace Mann Insurance Company ("the petitioner" or "HMIC") for the period from September1, 2002, through September 1, 2003(App. 37). The policy provided personal coverage for the members of the Association, including the supervisory school personnel of the Lincoln County Board of Education(App. 37). This "supplemental" policy voluntarily purchased by the Association explicitly stated that it was a "low cost" policy providing personal protection to the Association's members over and above the state-mandated insurance for public school employees which it had already purchased(App. 37;46-47).

The supplemental insurance policy the petitioner issued to the members of the West Virginia Education Association provides in pertinent part:

> **Coverage A –Educators Liability**
> $1,000,000 per member per occurrence not to include any civil rights issues or claims
>
> ....
>
> **NEA EDUCATORS EMPLOYMENT LIABILITY CONTRACT**
>
> ....
>
> **I. INSURING AGREEMENTS**
>
> Horace Mann Insurance Company, called HMIC in this contract, agrees to provide the Insured . . . with the coverages shown on the declarations page in return for the payment of the premium and subject to the limits of liability, exclusions, conditions and all other terms of this contract.
>
> ....
>
> **II. COVERAGES**
>
> Subject to the exclusions, conditions, limits of liability and other terms of this contract:
>
> **A. COVERAGE A - EDUCATORS LIABILITY.**
>
> HMIC agrees to pay on behalf of the Insured any and all loss, subject to the limit of liability . . . . Such loss must be sustained by the Insured by reason of liability imposed by law for damage caused by an occurrence in the course of

the Insured's educational employment activities.

VIII. CONDITIONS

....

I. **OTHER INSURANCE**. This is a manuscript contract and is personal to the individual named herein. **It was written and priced to reflect the intent of all parties that this policy is in excess of any and all other insurance policies, insurance programs, self-insurance programs, and defense and indemnification arrangements whether primary, excess, umbrella or contingent and whether collectible or not, to which the Insured is entitled or should have been entitled, by contract or operation of law, to coverage or to payment including, but not limited to, payment of defense and/or indemnification.**

Further, **it is the intent of the parties that the coverage afforded in this policy does not apply if the Insured has other valid and collectible insurance of any kind whatsoever whether primary or excess,** or if the Insured is entitled to defense or indemnification from any other source whatsoever, including, by way of example only, such sources as state statutory entitlements or provisions, **except any excess beyond the amount which would have been payable under such other policy or policies** or insurance program or defense or indemnification arrangement had

this policy not been in effect. Other valid and collectible insurance includes, but is not limited to, policies or insurance programs of self-insurance purchased or established by or on behalf of an educational unit to insure against liability arising from activities of the educational unit or its employees regardless of whether or not the policy or program provides primary, excess, umbrella, or contingent coverage . . . .

This policy is specifically excess over coverage provided by school district or school board errors and omissions or general liability policies purchased by the Insured's employer or former employer and it is specifically excess over coverage provided by any School Leaders Errors and Omissions Policy purchased by the Insured's employer or former employer and it is specifically excess over coverage provided by any policy of insurance which purports to be excess to or recites that it is excess to a policy issued to the Insured for the benefit of members of the National Education Association. . . .

If it is determined that HMIC must contribute to the coverages provided in Section III of this contract with any other valid and collectible excess insurance, HMIC's contributing limit of liability shall be determined andpaid as follows: . . . .

(App. 34-36;45-48)(emphasis in original and supplied).

The plain language employed by the petitioner HMIC in its supplemental liability insurance policy for members of the West Virginia Education Association----highlighted above-----makes clear that it was issuing a policy providing the members with personal insurance protection in the amount of $1,000,000 *over and above any state-mandated insurance* and that the parties to this insurance contract, i.e. the Association members and HMIC, intended it to be "low cost" coverage in excess of "any and all other insurance policies, insurance programs, self-insurance programs, and defense and indemnification arrangements whether primary, excess, umbrella or contingent and whether collectible or not, to which the [Association member] is entitled"(App. 34;47). One of the Association's members was David Bell, a principal in the Lincoln County school system(App. 41).

With these three separate insurance policies in place, the 2002-2003 school year commenced in the Lincoln County School District. During the school year, a high school teacher in the school system sexually abused a student and the student's parents sued the teacher, the school board and several school system employees, including the school's principal David Bell(App. 2-3;33). Following mediation in April of 2004, the parents' claims were settled in consideration of the full payment by National Union as the primary insurer of its policy limits ($1,000,000) together with a contribution from General Star, which contribution did not exhaust the $5,000,000 limits of its excess policy(App. 2-3;29;41).

The respondent General Star sought reimbursement from the petitioner HMIC upon the

terms of the supplemental liability insurance policy which HMIC had issued to David Bell as one of the members of the West Virginia Education Association(App. 3;33;41). The petitioner refused contribution believing that its policy was excess over General Star's own excess policy and that it therefore provided no coverage unless and until the limits of the General Star's insurance policy were exhausted, a contingency which had not taken place(App. 3;33;41).

The petitioner HMIC then commenced this civil action against the respondent General Star in the United States District Court for the Northern District of West Virginia (Clarksburg Division) positing federal jurisdiction on diversity of citizenship and seeking a declaratory judgment that the petitioner's insurance policy with the Association members was intended to be excess to any other available insurance, that the plain provisions of its policy so provided, and that the limits of the General Star policy must therefore be completely exhausted before any amounts of coverage available under its policy could be contributed(App. 3;33;41-42). The respondent counterclaimed for a declaratory judgment favoring its position and the matter eventually came on for resolution in the district court upon the parties' cross motions for summary judgment(App. 41-42).

The district court, Keeley, J., granted the petitioner's summary judgment motion, denied the respondent's motion and entered a declaratory judgment "that the coverage provided by Horace Mann policy is unambiguously excess to the coverage provided by the General Star policy"(App. 42;64). In reaching this result, the district court sitting in

diversity applied the substantive law of West Virginia to conclude that the recitals in the "Conditions" part of HMIC's insurance policy of the parties' intent that the coverage here be excess to all other insurance policies was incorporated by reference into the body of the insurance contract itself and thus was an "obligatory" condition of the insurance coverage it was providing(App. 53-54).

In addition, it rejected the argument that the "Other Insurance" clause in the petitioner's policy was really an "escape clause" rendering HMIC a primary insurance policy when compared to General Star's policy which contains an express excess clause(App. 54-55). As Judge Keeley reasoned,

> [t]o be an escape clause, the challenged language in Horace Mann's policy would have to disclaim any coverage if another policy also covered the insured. This it clearly does not do. Rather, the ["Other Insurance"] provision states that the policy "does not apply...*except* any excess" above the coverage provided by other applicable policies. Thus, the challenged language is an excess, not an "escape," clause, that reads consistently with the language of the Horace Mann "Other Insurance" provision challenged as a recital.

(App. 55)(emphasis in original).

Nor did the district judge regard the apportionment language in the "Other Insurance" clause as rendering this "super-excess" language ambiguous(App. 55-56). As it concluded, apportionment might occur if another "super-excess" insurance policy

like the petitioner's was implicated, causing competing or repugnant super-excess clauses to be reconciled which could lead to apportionment (App. 56). However, there were no competing or repugnant super-excess clauses here and the apportionment language was not implicated and therefore created no ambiguity or conflict(App. 56).

Finally, the motion judge rejected General Star's argument that together the general and specific language of the "Other Insurance" clause of the petitioner's insurance policy renders it ambiguous and unenforceable(App. 57-58). Noting the specific language in the petitioner's policy that its coverage is excess to any "excess, umbrella or contingent" coverage provided to any "educational unit" or "its employees" and that this is precisely the kind of state-mandated excess coverage which General Star provided to the Lincoln County Board of Education, the district judge concluded that "no specific declaration in the Horace Mann 'other insurance' provision conflicts with the declaration that the policy's coverage is excess to 'any and all other insurance policies'"(App. 58).

Judge Keeley accordingly applied West Virginia substantive law to conclude that the plain and ordinary meaning of the unambiguous language used in both of these policies supports the conclusion that, as written, the coverage provided by the petitioner's policy is unambiguously excess to the coverage provided by General Star's policy(App. 58).

Moreover, nothing in *Allstate Insurance Co. v. American Hardware Mutual Ins. Co.*, 865 F.2d 592(4th Cir. 1989) compelled a different conclusion(App. 59- 64). There the court of appeals determined the order of

priority for two secondary motor vehicle liability insurers, one of whom provided only umbrella coverage and the other provided both primary and excess coverage(App. 59-60). Without dispositive West Virginia law on the subject, it adopted a rule (the so-called "*Allstate* Rule") that primary policies with excess clauses which are invoked by the circumstances of the loss must be exhausted *before* the carrier of an umbrella policy like General Star would be required to pay(App. 60-61). General Star argued that the *Allstate* Rule applied here because it was a pure umbrella carrier and the petitioner's policy actually provides primary insurance coverage which converts to excess coverage through the operation of its "Other Insurance" clause(App. 61).

The district judge emphatically rejected this argument(App. 62-64). First, this was not a motor vehicle loss but one involving a sexual assault by school employees in their official capacities (App. 62). Second, the petitioner's policy was always intended to provide *only* excess coverage to General Star's umbrella coverage, umbrella "coverage that is part of a statutorily guaranteed package of insurance for education units and their employees in West Virginia"(App. 62). As the district court concluded:

> unlike the policies containing "non-owned" vehicle clauses in the *Allstate* cases [which caused the primary policy there to convert to an excess policy], Horace Mann's policy is not intended to be a primary policy. Indeed, its policy language unambiguously makes its coverage excess whenever any other insurance covers the liability, no matter what the

> circumstances. It cannot be overemphasized that, here, those circumstances include General Star's obligation under West Virginia law to cover the Board of Education of Lincoln County and its employees for liability arising from the sexual assault....*Thus it was pursuant to a clear statutory mandate defining its responsibilities and the scope of its coverage that General Star provided umbrella coverage to the Lincoln County Board of Education and its employees.*
>
> West Virginia law, moreover, required the Board not only to purchase that insurance, but also to indemnify its employees for damages arising out of their employment. As a school principal in the Lincoln County public school system, David Bell, therefore, was protected under this comprehensive, two-tiered scheme. *By contrast, Horace Mann insured Bell through his voluntary membership in the WVEA with an additional layer of coverage that was intended to be "excess of any and all other insurance policies."* That policy was never designed to provide primary coverage...but, under the facts here, to cover a judgment beyond the limits of the Board's primary and umbrella coverage. Thus, when viewed "in the light of total policy insuring intent,"...the Court holds that West Virginia law does not support the application of the "*Allstate* Rule" in this case, and concludes that General Star's policy limits must be exhausted before Horace Mann has any obligation to contribute its coverage.

(App. 62-64)(emphasis supplied; footnotes omitted).

General Star appealed and a majority of the court of appeals reversed this ruling and remanded the case to the district court for the entry of judgment declaring the General Star policy excess to the Horace Mann policy(App. 1-28). It ruled that General Star's policy was a true excess policy which for its coverage requires the exhaustion of the limits of the underlying primary liability insurance; that the petitioner's policy is actually a primary liability policy or a "coincidental excess" policy because it does not require the insured to maintain other insurance and does not limit its coverage to losses in excess of any underlying or primary insurance; and that the "Other Insurance" clause in the petitioner's policy does not change this analysis(App. 12-14).

Without any reference to relevant West Virginia decisional law or to its mandated statutory scheme for insuring public school systems and its employees with primary coverage of $1 million dollars and excess coverage up to $5 million dollars, the majority reasoned:

> [t]hat the petitioner's policy will typically *operate* as an excess policy ...simply cannot change the fact that the policy is written to provide primary liability insurance. Horace Mann could have offered NEA members a true excess policy that provided coverage after exhaustion of the limits of West Virginia's statutorily mandated insurance. It instead chose to offer a policy that provides some amount of primary liability coverage but converts to excess coverage when other insurance exists. The excess other-insurance clause works to reduce

> Horace Mann's exposure in most cases, but it does not transform the policy into a true excess policy.

(App. 15)(emphasis in original). In the continuing absence of any West Virginia law on the subject, it then applied the *Allstate* Rule to conclude that the limits of the petitioner's primary liability insurance with an other-insurance clause (making it a coincidental excess policy) must first be exhausted *before* resort to General Star's true excess policy; and it predicted that West Virginia, if given the opportunity, would adopt the rule (App. 15-16;20-21;24;27).

Circuit Judge Niemeyer dissented(App.29-39). He criticized the majority for failing to employ simple rules of contract construction in order to come to the common sense conclusion, like the district court, that the "Other Insurance" provisions in each of these two policies were entirely consistent, explicitly anticipating an order of coverage so that the petitioner's policy was excess over the General Star policy(App. 29-30). That is, the language of the "Other Insurance"clause in the petitioner's policy specifically defines its coverage to be excess over the General Star policy; and the "Other Insurance" clause in General Star's policy explicitly provides that its policy was *not* an excess policy over another policy when the other policy (like the petitioner's policy) provides that it is an excess policy over the General Star policy(App. 29-30;34-35).

Moreover, the dissent, like the district court, took note of the fact that as opposed to the $480,000 in premiums charged the Board by General Star for its umbrella policy pursuant to the insurance scheme mandated by W. Va. Code § 29-12-5a, "[t]he Horace

Mann policy explicitly stated that it was a low-cost policy providing personal protection to [WVEA] members over and above the state-mandated insurance for public school employees"(App. 33). As Judge Niemeyer observed,

> [i]t is apparent from this language [in the petitioner's "Other Insurance" clause in its policy] and the statutory mandate for insurance that the West Virginia Education Association was purchasing a supplemental policy for its members to provide backstop coverage beyond that provided by [the primary insurer] National Union and General Star to the school board and its employees under state statutory requirements. This is the explicitly stated posture of the Horace Mann policy—to provide coverage in excess of the coverage provided by [National and General Star]....

(App. 36).

Finally, because the "Other Insurance" clauses in these two policies here can be harmonized consistent with their plain words, the dissent thought that the *Allstate* Rule—employed to resolve *conflicting* "Other Insurance" clauses---was misapplied by the majority. As Judge Niemeyer reasoned, "when there is no conflict among the clauses, it remains the governing law in West Virginia that '[l]anguage in an insurance policy should be given its plain, ordinary meaning.'"(App. 39 citing *Horace Mann Ins. Co. v. Adkins*, 599 S.E.2d 720, 724(W. Va. 2004)).

On February 20, 2008, the court of appeals denied the petitioner's timely filed combined petition

for panel rehearing or for rehearing *en banc*(App. 67-68).The petitioner now respectfully brings this petition to the Court seeking a writ of certiorari to the Court of Appeals for the Fourth Circuit.

REASONS FOR GRANTING THE PETITION

The Court of Appeals Nullified Substantive West Virginia Law And Created Federal Common Law At Odds With The State's Statutory Scheme For Insuring Public Schools And Their Employees By Misreading The Unambiguous Language Of Two Excess Insurance Policies, Undermining The Reasonable Expectations of Coverage And Subverting The Concerns Of Comity And Federalism Expressed By This Court In *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) And Its Progeny.

It is well settled law in West Virginia that the language of an insurance policy contract, like any other contract, must be accorded its plain meaning and where plain and unambiguous, the language must be given its full effect with no judicial construction or interpretation being permitted. *Deel v. Sweeney*, 383 S.E.2d 92, 94(W.Va. 1989). *Keffer v. Prudential Insurance Company of America*, 172 S.E.2d 714, 715-716(W.Va. 1970). *Cotiga Development Co. v. United Fuel Gas Co.*, 128 S.E.2d 626, 631(W.Va. 1962). *Stone v. National Surety Corporation*, 125 S.E.2d 618,619-620 (1962). As the *Keffer* Court stated,

> [i]f the language employed [by an insurance contract] is unambiguous and clear, there is no occasion for construction. Stated differently, resort to general rules for the construction of an insurance policy is unnecessary where the

> contract is unambiguous and its meaning clear. *The court is bound to adhere to the insurance contract as the authentic expression of the intention of the parties, and it must be enforced as made where its language is plain and certain.* This means that the terms of an unambiguous insurance policy cannot enlarged or diminished by judicial construction, since the court cannot make a new contract for the parties....

172 S.E.2d at 716(emphasis supplied). *Accord, Imperial Fire Ins. Co. v. Coos County*, 151 U.S. 452, 463(1894) ("Contracts of insurance, like other contracts, must be construed according to the terms which the parties have used, to be taken and understood, in the absence of ambiguity, in their plain, ordinary and popular sense").

The process of determining the scope of coverage intended by the insured and the insurer in their contract requires a "simple reading of the insurance policy," giving reasonable effect "to the King's English." *Bender v. Glendenning*, 632 S.E.2d 330, 345(W.Va. 2006)(Starcher, J., concurring). When its terms convey a clear and unambiguous meaning, a court cannot indulge in ferreting out hidden meanings or unexpressed intentions in order to make a new contract for the parties. *American Safety Indem. v. Stollings Trucking Co.*, 450 F. Supp. 639, 642-643(S.D.W.Va. 2006) citing *Satterfield v. Erie Ins. Property and Cas.*, 618 S.E.2d 483, 485-486(W.Va. 2005). See *Cox v. Amick*, 466 S.E.2d 459, 468 (W.Va. 1995).

Consistent with this uniform decisional law of West Virginia, both the district court and Circuit Judge Niemeyer rightly ruled that the plain terms of the

"Other Insurance" clause of the insurance contract between the petitioner-insurer and the WVEA members manifests their unmistakable "intent...that this policy is in excess of any and all other insurance policies, insurance programs, self-insurance programs, and defense and indemnification arrangements whether primary, excess, umbrella or contingent and whether collectible or not, to which [WVEA and its members are] entitled"(App. 34-35;46-47). This statement of the parties' intent was not merely a non-binding recital but rather an obligatory condition of coverage. *Martin v. Rothwell*, 95 S.E. 189, 190(W.Va. 1918).

Moreover, the correlative "Other Insurance" clause in General Star's excess policy expressly acknowledged that its policy would *not* be an excess policy over another policy which provides (like petitioner's policy) that it was an excess policy over General Star's policy(App. 10;29-30;50). Thus reading their plain and unambiguous terms, the "Other Insurance" clauses of these two policies are *not* in conflict, are entirely consistent, and their language reinforces the notion that the order of coverage was for the petitioner's policy to be excess over the General Star's policy(App. 29-30).

However, even if there were ambiguity in either of the parties' "Other Insurance" clauses to warrant judicial interpretation, the result would be the same under the established substantive law of West Virginia. Whenever the language of an insurance policy is doubtful or when its interrelationship with another policy is reasonably susceptible to two different interpretations, the ambiguity or conflict will be resolved in favor of the insured (WVEA and its

members) so that it will receive the maximum protection it purchased from the insurer(s) under the insurance policies. *Horace Man Insurance Co. v. Adkins*, 599 S.E.2d 720, 724-725(W.Va. 2004). *Tennant v. Smallwood*, 568 S.E.2d 10, 13 n.7(W.Va. 2002). *Change, Inc. v. Westfield Ins. Co.*, 542 S.E.2d 475, 478(W.Va. 2000). *Shamblin v. Nationwide Mut. Ins. Co.*, 332 S.E.2d 639, 642(W.Va. 1985). *Stone v. National Surety Corporation, supra. Accord, Bergholm v. Peoria Life Ins. Co.*, 284 U.S. 489, 492(1932); *Mutual Ins. Co. v. Hurni Co.*, 263 U.S. 167, 174(1923).

To the same point, under well settled West Virginia law, any ambiguity concerning the extent of insurance coverage will be construed to meet the reasonable expectations of the insured "even though painstaking study of the policy provisions would have negated those expectations." *State Bancorp v. U.S. Fidelity and Gaur.*, 483 S.E.2d 228, 233(W.Va.1997). *National Mut. Inc. Co. v. McMahon & Sons*, 356 S.E.2d 488, 495-496 & n. 6(W.Va. 1987). Thus any ambiguity in the petitioner's policy or its apparent conflict with General Star's policy should be harmonized so that the insured WVEA and its employees receive liability insurance consistent with its reasonable expectations, i.e., mandatory primary insurance in the amount of $1 million(National Union), mandatory excess or umbrella insurance up to $5 million dollars(General Star), and then voluntary "super-excess" insurance of $1 million dollars (Horace Mann).

This coherent, common sense ordering of insurance coverage for the Board and its employees accommodates not only the express language in the relevant insurance policies it purchased but also the

realities of the marketplace where the Board paid General Star significant premiums for its umbrella coverage and relatively less for the petitioner's "low-cost" super-excess coverage. See *Gauze v. Reed*, 633 S.E.2d 326, 333(W.Va. 2006). In this regard, common sense bolsters the parties' intent and a plain reading of the policies: why would WVEA purchase for its members a *second* $1 million dollars in primary coverage, as the majority found, when its members *already have $1 million dollars in primary coverage* and up to $5 million dollars in excess coverage as mandated and paid for by the State?

The simple answer is that it would not reasonably do so; and WVEA's clear intent in purchasing this liability insurance from the petitioner was to supplement the insurance coverage which was mandated by the State *and which the Board had already purchased* from National Union and General Star in order to provide its members, including Bell, with the peace of mind which a last layer of insurance coverage brings. After all, in this controversy between two insurers about the kind of coverage which WVEA purchased from the petitioner, its resolution turns *not* on General Star's self-serving characterization of the policy since it was not a party to the contract, see *Progressive Paloverde Ins. v. Hartford Fire Ins.*, 356 F.3d 524, 529(4th Cir. 2004), but rather on an analysis under established West Virginia law of the petitioner's policy bottomed on its plain language, the parties' intent about its coverage and the reasonable expectations of the insured, WVEA.

As cited above, the substantive law of West Virginia is crystal clear about the result when such an

analysis is applied to these facts. Construing the plain and unambiguous language of the "Other Insurance" provisions in each of these two policies renders a conclusion that these provisions are entirely consistent, explicitly anticipating an order of coverage so that the petitioner's policy was excess over the General Star policy. The language of the "Other Insurance"clause in the petitioner's policy specifically defines its coverage to be excess over the General Star policy; and the "Other Insurance" clause in General Star's policy explicitly provides that its policy was *not* an excess policy over another policy when the other policy (like the petitioner's policy) provides that it is an excess policy over the General Star policy(App. 29-30;34-35).

Moreover, because the"Other Insurance" clauses in these policies can be harmonized consistent with their plain words, the *Allstate* Rule—employed to resolve *conflicting* "Other Insurance" clauses---was misapplied by the majority. "[W]hen there is no conflict among the clauses, it remains the governing law in West Virginia that '[l]anguage in an insurance policy should be given its plain, ordinary meaning.'"*Horace Mann Ins. Co. v. Adkins*, 599 S.E.2d at 724.

By rejecting this settled law of West Virginia to resolve this controversy, by refusing to read the plain and unambiguous language of each of the policies' "Other Insurance" clauses as consistent with each other and then by applying inappropriately the *Allstate* Rule to decide that the petitioner's policy was really a primary policy which must be exhausted before resort to General Star's excess policy, the majority nullified West Virginia's decisional law on the subject, undermined its statutory scheme for insuring the public

school system and its employees and subverted the concerns of comity and federalism expressed by this Court in *Erie R. Co. v. Tompkins*, 304 U.S. 64(1938) and its progeny.

Under *Erie*, when a federal court exercises diversity, pendent or supplemental jurisdiction over state law claims, "the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." *Felder v. Casey*, 487 U.S. 131, 151(1988) quoting *Guaranty Trust Co. York*, 326 U.S. 99, 109(1945). Avoiding judge-made rules in federal court which undercut a litigant's rights which he otherwise would enjoy under state law promotes comity and federalism, discourages forum-shopping and acknowledges that the pronouncements of the State courts on the substantive rights of its citizens are in most cases expressions of their sovereignty. *Bush v. Gore*, 542 U.S. 692, 740-742(2000) (Rehnquist, C.J., concurring).

> As this Court explained in *Erie*, the Constitution of the United States [including the Tenth Amendment]...recognizes and preserves the autonomy and independence of the States---- independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a

denial of its independence.

304 U.S. at 78-79. See *Alden v. Maine*, 527 U.S. 706, 754(1999)(our federal system bespeaks the fact that the various States remain sovereign entities whose judicial independence must be respected by Article III courts).

Erie, a vital expression of our federal system, mandates that a federal court sitting in diversity jurisdiction apply the substantive law of West Virginia, the forum State, in order to decide the rights of the parties absent a federal statutory or constitutional directive to the contrary. *Salve Regina College v. Russell*, 499 U.S. 225, 226(1991). "The nub of the policy that underlies *Erie*...is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result." *Ferens v. John Deere Co.*, 494 U.S. 516, 524(1990) quoting *Guaranty Trust Co. v. York, supra.*

In addition, this Court has made clear in various decisions after *Erie* that federal courts determine state law in the same manner by which they determine federal law, i.e., "with the aid of such light as [is] afforded by the materials for decision at hand, and in accordance with the applicable principles for determining state law." *Salve Regina College v. Russell, supra*, quoting *Meredith v. Winter Haven*, 320 U.S. 228, 238(1943). See *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 208-209(1938). See *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 730(1979); *West v. A.T. & T. Co.*, 311 U.S. 223, 236-237(1940); *Six Companies v. Highway Dist.*, 311 U.S. 180, 188(1940).

Moreover, in view of the court of appeals' affirmative duty under the decisions of this Court to review independently and then correct the district court's determination of state law when fixing the rights of the parties, *Erie, supra*; *Salve Regina College v. Russell*, 499 U.S. at 231; 234, it was incumbent on the court of appeals to carry out this task with conviction so that the doctrinal coherence between State and federal courts was advanced and the twin aims of *Erie*—"discouragement of forum-shopping and avoidance of inequitable administration of the laws," *Hanna v. Plumer*, 380 U.S. 460, 468(1965)—were accomplished.

Yet the court of appeals failed in this fundamental duty. Creating federal "general" common law at odds with the substantive law of West Virginia in order to reach a particular result, see *Sosa v. Alvarez-Machain*, 542 U.S. 692, 726(2004), it ignored West Virginia decisional law as well as the State's statutory scheme mandating that public school systems and its employees be insured with primary liability coverage of $1 million dollars and excess coverage up to $5 million dollars. Contrary to established State decisional law which, if applied, would have harmonized the competing "Other Insurance" clauses of the two policies and found no conflict, the court of appeals decided that there was a conflict between the clauses and then wrongly applied the *Allstate* Rule in the absence of State law to the contrary in order to conclude that the limits of the petitioner's policy must first be exhausted *before* resort to General Star's true excess policy.

This "blatant federal-court nullification of state law," *Michael O. Leavitt v. Jane L.*, 518 U.S. 137, 144-

145(1996), is a matter which invokes this Court's power of superintendency over the federal courts so that the decision below by the court of appeals does not damage federal-state relations, does not lead to forum-shopping or to disparate opinions about the rights of competing excess carriers or the legitimate reach of the *Allstate* Rule, all valid concerns for West Virginia legislators and judges as well as for public policy in the State generally.

CONCLUSION

For all of these reasons identified herein, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fourth Circuit and, ultimately, to vacate that judgment and remand the matter to the United States District Court for the Northern District of West Virginia with instructions that a judgment enter granting the petitioner's motion for summary judgment and declaring that the coverage provided by the petitioner in its policy is unambiguously excess to the coverage provided the insured by the respondent's insurance policy; or provide the petitioner such other relief as is fair and just in the circumstances of this case.

Respectfully submitted,

Daniel C. Cooper
Jamison H. CroppCooper
Law Offices
240 West Main St
Bridgeport, WV 26330
(304)842-0505

Dennis P. Derrick
Counsel of Record
7 Winthrop St
Essex, MA 01929-1203
(978) 768-6610

(any footnotes trail end of each document)

No. 06-2156
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

HORACE MANN INSURANCE COMPANY,
Plaintiff-Appellee,

v.

GENERAL STAR NATIONAL INSURANCE COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of West Virginia, at Clarksburg. (1:04-cv-00163-IMK). Irene M. Keeley, Chief District Judge.

September 26, 2007, Argued
January 23, 2008, Decided

COUNSEL: ARGUED: Jeffrey Alan Holmstrand, MCDERMOTT & BONEN-BERGER, P.L.L.C., Wheeling, West Virginia, for Appellant.

Daniel C. Cooper, Bridgeport, West Virginia, for Appellee.

ON BRIEF: Jamison H. Cropp, STEPTOE & JOHNSON, Clarksburg, West Virginia, for Appellee.

JUDGES: Before NIEMEYER and TRAXLER, Circuit Judges, and Samuel G. WILSON, United States

District Judge for the Western District of Virginia, sitting by designation. Judge Traxler wrote the majority opinion, in which Judge Wilson joined. Judge Niemeyer wrote a dissenting opinion.

OPINION BY: TRAXLER

OPINION

TRAXLER, Circuit Judge:

This appeal involves a dispute between two insurance companies, with each company claiming that the insurance provided by its policy was "excess" to the other insurance and that its coverage therefore was not triggered until the limits of the other company's policy were exhausted. The district court granted summary judgment in favor of Horace Mann Insurance Company, concluding that its policy was excess to the policy issued by General Star National Insurance Company. General Star appeals. We reverse the decision of the district court and remand for entry of judgment declaring the General Star policy excess to the Horace Mann policy.

I.

A West Virginia high school student was sexually abused by a teacher, and the student filed suit against numerous defendants, including the school board and the school principal. The parties settled the claims for an amount in excess of $ 1,000,000.

West Virginia law requires the State Board of Risk and Insurance Management to provide a minimum of $

1,000,000 of liability insurance coverage for all county school boards and their employees. *See* W. Va. Code § 29-12-5a. The board must also provide a minimum of $ 5,000,000 in excess liability insurance coverage. *See id.*

In this case, the statutorily required first layer of liability insurance was provided by National Union Fire Insurance Company, and the $ 5,000,000 in excess liability coverage was provided by General Star. National Union contributed its policy limits to the settlement of the student's claims, and General Star, as excess insurer, contributed the balance of the settlement amount.

General Star thereafter sought reimbursement from Horace Mann Insurance Company, which had issued to the school principal a policy providing some coverage for the student's claim. Believing that its policy provided no coverage until the limits of the General Star policy were exhausted, Horace Mann commenced this declaratory judgment action seeking a declaration of the parties' obligations with regard to the settlement.

The district court granted summary judgment in favor of Horace Mann. The district court compared the language of the "other insurance" clauses contained in the General Star and Horace Mann policies and concluded that the Horace Mann policy was excess to all other insurance policies, while the General Star policy contemplated situations where other policies would be excess to its coverage. The district court therefore concluded that the language of the policies required the limits of the General Star policy to be

exhausted before any contribution was required under the Horace Mann policy

II.

On appeal, General Star argues that its policy is a true excess policy, unlike the Horace Mann policy, which provides primary coverage that sometimes becomes excess by virtue of an "other insurance" clause. General Star argues that it is a well-established principle of insurance law that true excess policies are always excess to policies that provide primary coverage, and that the district court therefore erred by granting summary judgment in favor of Horace Mann.

As we will explain, we agree with General Star that its status as a true excess insurer requires us to reverse the decision of the district court. Before delving into the details of General Star's argument, however, we believe it will be helpful to first discuss the nature and operation of primary and excess liability insurance policies. Because we are sitting in diversity, our role is to apply the governing state law, or, if necessary, predict how the state's highest court would rule on an unsettled issue. *See Private Mortgage Inv. Servs., Inc. v. Hotel & Club Assocs., Inc.*, 296 F.3d 308, 312 (4th Cir. 2002). Accordingly, where there is West Virginia law addressing a particular question, we will follow it. But if the West Virginia courts have not addressed an issue, we will look to generally accepted principles of insurance law, because we believe that West Virginia's Supreme Court of Appeals would adopt those principles as its own.

A.

Primary liability insurance "provides the first layer of insurance coverage. Primary coverage attaches immediately upon the happening of an 'occurrence,' or as soon as a claim is made. The primary insurer is first responsible for defending and indemnifying the insured in the event of a covered or potentially covered occurrence or claim." *Gauze v. Reed*, 219 W. Va. 381, 633 S.E.2d 326, 332 (W. Va. 2006) (internal quotation marks omitted). "Because most losses are within primary policy limits and therefore create greater exposure for primary insurers, and because primary insurers are generally obligated to defend their insureds, primary insurers charge larger premiums for coverage than do excess and umbrella carriers." *Id.* (internal quotation marks omitted)

Excess liability policies, by contrast, do not provide first-dollar coverage for insured losses, but instead provide an additional layer of coverage for losses that exceed the limits of a primary liability policy. Coverage under an excess policy thus is triggered when the liability limits of the underlying primary insurance policy have been exhausted. *See id.* ("In keeping with the reasonable expectations of the parties, including the insured, which paid separate premiums for its primary and excess policies, excess coverage generally is not triggered until the underlying primary limits are exhausted by way of judgments or settlements." (internal quotation marks and citation omitted)); 15 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* § 220:32 (3d ed. 2005) ("'The purpose of . . . excess . . . coverage is to protect the insured in the event of a catastrophic loss in which liability exceeds the available

primary coverage. Accordingly, it is only after the underlying primary policy has been exhausted does the excess . . . coverage kick in." (footnote omitted)). "Excess insurance is priced on the assumption that primary coverage exists: indeed, an excess policy usually requires by its terms that the insured maintain in force scheduled limits of primary insurance."[1] *Gauze*, 633 S.E.2d at 332 (internal quotation marks omitted).

The General Star policy at issue in this case is a typical excess policy. The policy describes itself an excess liability policy, *see* J.A. 25 ("Certificate of Excess Insurance"), and the declarations on the first page of the policy include a listing of the required underlying insurance and define the coverage as limited to occurrences where liability is "in excess of the limits" of the underlying insurance, J.A. 25. The policy's insuring agreement likewise clearly defines the coverage as excess in nature. *See* J.A. 31 ("The Company shall indemnify the insured for ultimate net loss in excess of the underlying insurance stated in Item 2 of the Declarations, but not in excess of the Company's limits of liability stated in Item 3 of the Declarations.").

The Horace Mann policy is an "educators employment liability" policy issued to the school principal by virtue of his membership in the National Education Association. J.A. 16. It provides for $ 1,000,000 of coverage per member per occurrence for claims other than civil rights claims; $ 300,000 of coverage for civil rights claims; reimbursement of up to $ 35,000 for attorney's fees incurred in successfully defending a criminal action; and $ 1,000 bail bond premium reimbursement. Whether the policy is a primary or excess policy is a matter of some dispute that we will

address in detail later in the opinion. For the moment it suffices to say that the policy appears to provide first-dollar, primary liability insurance coverage for the specified risks.

B.

Under certain circumstances, a primary liability insurance policy may in fact provide only excess liability coverage. Because multiple insurance policies may cover a given loss, liability insurance policies generally contain "other insurance" clauses that attempt to define the insurer's responsibility for payment when other insurance coverage is available. These clauses typically take the form of a pro-rata clause, an escape clause, or an excess clause. A pro-rata clause "limit[s] the insurer's liability to its pro rata share of the loss in the proportion that its policy limits bear[] to the aggregate of available liability coverage." *State Farm Mut. Auto. Ins. Co. v. U.S. Fid. & Guar. Co*, 490 F.2d 407, 410 (4th Cir. 1974). An escape clause provides that the insurer will have no liability to the insured when other insurance coverage is available, while an excess clause provides that the insurer will be liable only after the exhaustion of the limits of any other applicable insurance. *See id.*; *see also* 15 Russ & Segalla, *Couch on Insurance* § 219:5.

A primary liability insurance policy that contains an excess other-insurance clause thus effectively *operates* as an excess policy if other insurance is available. That is, even though the policy would provide primary, first-dollar coverage for an insured loss if no other insurance policy covered the loss, it will provide excess coverage when other insurance is available. Primary liability

policies with excess other-insurance clauses are sometimes referred to as "coincidental excess" policies. *See Fireman's Fund Ins. Co. v. CNA Ins. Co.*, 177 Vt. 215, 862 A.2d 251, 266 (Vt. 2004) ("'[C]oincidental' excess insurance is primary insurance that is rendered excess by operation of a policy provision, like an 'other insurance' clause, in a specific set of circumstances.").

Other-insurance clauses are generally valid and enforceable, *see* 15 Russ & Segalla, *Couch on Insurance* § 219:3, and the clauses are easy enough to interpret and apply when only one policy with an other-insurance clause is involved. Interpretation and application of the clauses, however, may be quite difficult in cases where multiple liability policies potentially provide coverage for a given loss and each of the policies contains an other-insurance clause. For example, if two potentially applicable policies both contain an escape clause, application of the clauses as written could leave the insured without *any* liability coverage--each insurer could point to the existence of the other policy and claim that its escape clause relieved it of any obligation under the policy. And in cases where both policies contain excess other-insurance clauses, each insurer will contend that its other-insurance clause makes it excess to the other and that the other policy must therefore provide primary coverage. In such cases there typically is no language in either policy that gives a court a contractually-based way to decide which policy should be excess to the other. *Cf. Employers Reinsurance Corp. v. Phoenix Ins. Co.*, 186 Cal. App. 3d 545, 230 Cal.Rptr. 792, 798 (Cal. Ct. App. 1986) ("If we were to give effect to all three excess clauses in this instance, they would cancel each other out and afford the insured no coverage whatsoever. We would travel

full circle with no place to say 'the buck stops here.'"). Given the prevalence of other-insurance clauses, it is not surprising that "the books are replete with cases involving conflicts between various combinations of such clauses." *State Farm*, 490 F.2d at 410.

Generally speaking, in cases where the other-insurance clauses can be reconciled, the clauses will be enforced in accordance with their terms. *See, e.g., Citgo Petroleum Corp. v. Yeargin, Inc.*, La. App. 95-1574, 690 So. 2d 154, 167 (La. Ct. App. 1997); *Northland Ins. Co. v. Continental Western Ins. Co.*, 550 N.W.2d 298, 303 (Minn. Ct. App. 1996). In cases where there are actual conflicts in the language of the clauses, or where a literal application of the clauses could leave the insured without coverage, various methods for resolving the issue have gained acceptance. Some courts find conflicting other-insurance clauses to be "mutually repugnant" and thus unenforceable and require the insurers to bear pro-rata shares of the total liability. *See, e.g., State Farm*, 490 F.2d at 410; *Hoffmaster v. Harleysville Ins. Co.*, 441 Pa. Super. 490, 657 A.2d 1274, 1277 (Pa. Super. Ct. 1995). Other courts, however, resolve the conflicts by considering the "total policy insuring intent." Under this approach, where conflicting other-insurance clauses "cannot be resolved by the logic of their terms, the insurer whose coverage was effected for the primary purpose of insuring the particular risk should be primarily liable for payment, with the insurer whose coverage was most incidental to risk being liable last." 15 Russ & Segalla, *Couch on Insurance* § 219:49; *see, e.g., Integrity Mut. Ins. Co. v. State Auto. & Cas. Underwriters Ins. Co.*, 307 Minn. 173, 239 N.W.2d 445, 446-47 (Minn. 1976).

The Horace Mann and the General Star policies both include other-insurance clauses. The General Star clause states that

> [i]f other valid and collectible insurance with any other insurer is available to the insured covering a loss also covered by this Policy, other than insurance that is in excess of the insurance afforded by this Policy, the insurance afforded by this Policy shall be in excess of and shall not contribute with such other insurance. Nothing herein shall be construed to make this Policy subject to the terms, conditions, and limitations of other insurance, reinsurance or indemnity.

J.A. 35.

The relevant portions of the Horace Mann clause state that:

> *[The policy] was written and priced to reflect the intent of all parties that this policy is in excess of any and all other insurance policies, . . . whether primary, excess, umbrella, or contingent. . . .* [I]t is the intent of the parties that the coverage afforded in this policy does not apply if the insured has other valid and collectible insurance of any kind whatsoever whether primary or excess, . . . except any excess beyond the amount which would have been payable under such other policy or policies . . . had this policy not been in effect. Other valid and collectible includes, but is not limited to, policies . . . purchased by . . . an educational unit to insure against liability arising from activities of the educational unit or its

> employees, regardless of whether or not the policy . . . provides primary, excess, umbrella, or contingent coverage. . . .
>
> This policy is *specifically excess* over coverage provided by school district or school board errors and omissions or general liability policies purchased by the Insured's employer . . . and it is *specifically excess* over coverage provided by any policy of insurance which purports to be excess to or recites that it is excess to a policy issued to the Insured for the benefit of members of the National Education Association.

J.A. 22-23 (emphasis added).[2]

The district court viewed this case as a straightforward other-insuranceclause case and concluded that the clauses could be reconciled. The Horace Mann policy clearly indicates that it is to be excess to *all* other applicable insurance policies, including excess policies. The General Star policy, by contrast, states that it will be excess to all other insurance "*other than* insurance that is in excess of the insurance afforded by this Policy." J.A. 35 (emphasis added). The district court concluded that because the General Star policy contemplated that it might not always be excess and the Horace Mann policy made clear its intention to always be excess when other insurance is available, the Horace Mann policy was not required to contribute to the settlement of the underlying tort claims until the limits of the General Star policy were exhausted. And because payment of the underlying settlement did not exhaust General Star's policy limits, the district court granted summary judgment in favor of Horace Mann.

C.

We turn now to General Star's challenge to the district court's decision. General Star argues that its policy is a true (or pure) excess policy that only provides excess coverage and never provides primary coverage. Horace Mann's policy, by contrast, provides primary liability coverage that in some cases will convert to excess coverage by virtue of the other-insurance clause. General Star contends that the rules generally governing conflicts between other-insurance clauses do not apply when one of the policies at issue is a true excess policy and the other policy is a primary liability policy. Instead, General Star contends that priority disputes between a true excess policy and a primary policy with an excess other-insurance clause are always resolved in favor of the true excess policy.

(1)

"True excess" or "pure excess" is a description used to distinguish typical excess liability policies from coincidental excess policies--policies that provide primary liability coverage but operate as excess in a given case because of an other-insurance clause. *See Gauze*, 633 S.E.2d at 333 (concluding that policy was not a "pure excess" policy because it "provide[d] the first layer of insurance coverage, unless there was some 'other' coverage"); *see also Sherlock v. Ocean Salvage Corp.*, 785 So. 2d 932, 937 (La. App. 2001) ("In resolving conflicting 'other insurance' clauses it is important to distinguish between policies that are true excess policies and those that are actually primary policies with 'excess' other insurance clauses." (internal quotation marks omitted)).

There is no question that General Star's policy is a true excess policy. As the terms of its insuring agreement make clear, coverage under the General Star policy is dependent upon the exhaustion of the limits of underlying primary liability insurance, and this kind of dependence on an underlying liability policy is the hallmark of a true excess policy.

It is just as clear to us that the Horace Mann policy is a primary liability policy. The policy provides that it will pay "on behalf of the insured any and all [covered losses] subject to the limit of liability." J.A. 18. The policy does not require that the insured maintain other insurance, and neither the declarations nor the insuring agreements limit coverage to losses in excess of the limits of an underlying insurance policy. *See Gauze*, 633 S.E.2d at 333 (concluding that insurance policy was not a pure excess policy because the policy "did not provide specific coverage above a defined underlying limit of primary insurance," did not require the insured "to maintain in force certain scheduled limits of primary insurance," and there was no indication the "premiums were priced on the assumption that primary coverage existed"); *Commerce & Industry Ins. Co. v. Chubb Custom Ins. Co.*, 75 Cal. App. 4th 739, 89 Cal.Rptr.2d 415, 419-20 (Cal. Ct. App. 1999) (rejecting insurer's claim that policy was always intended to provide contingent or excess coverage, noting that the policy "meets the definition of primary coverage--the insurer's liability arises immediately upon occurrence of a covered loss--and fails to display the indicia of a true excess or umbrella policy, such as . . . specific identification of the primary coverage policy or other policy language" (citations omitted)). The policy as written thus provides primary, first-dollar liability

insurance.

Although the policy is written to provide primary liability coverage, Horace Mann, pointing to the language in its other-insurance clause, insists that the policy was always intended to be an excess policy. The language in the other-insurance clause, however, states only that the policy was intended to be excess to any other policy that may exist; if there is no other insurance, the primary coverage offered by the policy would be triggered. While this makes the policy a coincidental excess policy, the question is whether the policy qualifies as a *true* excess policy. Because the other-insurance clause does not make coverage in all cases dependent on the exhaustion of the limits of an underlying insurance policy, the other-insurance clause does not transform the policy into a true excess policy. *See, e.g., Firemen's Fund Ins. Co.*, 862 A.2d at 266 ("The fact that Fireman's policy is excess under a certain set of circumstances does not transform it from a primary policy with an 'other insurance' clause into a 'true' excess policy."); *CNA Ins. Co. v. Selective Ins. Co.*, 354 N.J. Super. 369, 807 A.2d 247, 254 (N.J. Supr. App. 2002) (explaining that an excess other-insurance clause contained in a primary insurance policy "does not transform that primary policy into an excess policy" (internal quotation marks omitted)); *Bosco v. Bauermeister*, 456 Mich. 279, 571 N.W.2d 509, 514 (Mich. 1997) ("Plaintiff misunderstands the basic nature of the Frankenmuth policy. It is a primary policy and has an excess clause that becomes operative in certain limited circumstances. This clause does not change the nature and function of the policy."); *North River Ins. Co. v. American Home Assur.*, 210 Cal. App. 3d 108, 257 Cal.Rptr. 129, 131 (Cal. App. 1989) ("The presence

of an 'other insurance' provision in a primary policy does not transform that primary policy into an excess policy vis a vis a secondary carrier with excess coverage.").

We recognize that in most cases where there is coverage under the Horace Mann policy, the policy will in fact operate as excess coverage. The Horace Mann policy apparently was developed specifically for West Virginia NEA members, all of whom should be covered by the statutorily mandated insurance coverage for county school board employees. The policy's other-insurance clause thus means that the policy generally will provide only excess coverage to a West Virginia teacher.[3] That the policy will typically *operate* as an excess policy, however, simply cannot change the fact that the policy is written to provide primary liability insurance. Horace Mann could have offered NEA members a true excess policy that provided coverage after exhaustion of the limits of West Virginia's statutorily mandated insurance. It instead chose to offer a policy that provides some amount of primary liability coverage but converts to excess coverage when other insurance exists. The excess other-insurance clause works to reduce Horace Mann's exposure in most cases, but it does not transform the policy into a true excess policy. *See Gauze*, 633 S.E.2d at 333; *CNA Ins. Co.*, 807 A.2d at 254; *Bosco*, 571 N.W.2d at 514.

(2)

The identification of the General Star policy as a true excess policy and the Horace Mann policy as a primary policy that becomes excess by operation of its other-insurance clause is effectively dispositive of the priority

issue presented in this appeal. Although the West Virginia Supreme Court has not spoken on this precise question, the general rule is that as between a true excess policy and a primary liability policy with an other-insurance clause, the limits of the policy that provides primary insurance must *always* be exhausted before coverage under the excess policy is triggered:

> [N]umerous courts in other jurisdictions have addressed the question and have aligned themselves with the position [the excess insurer] takes: a true excess insurance policy is secondary in priority to a primary insurance policy, even with respect to an incident for which the primary policy purports to make itself excess to any other available insurance. . . .

Indeed, it appears that not only is this the majority rule, but *the practically universal rule* in jurisdictions that have addressed the issue. Otherwise stated, the prevailing rule *is that umbrella insurance coverage is "true excess over and above any type of primary coverage, excess provisions arising in regular policies in any manner, or escape clauses."* *Monroe Guar. Ins. Co. v. Langreck*, 816 N.E.2d 485, 492-93 (Ind. App. 2004) (emphasis added); *accord National Surety Corp. v. Ranger Ins. Co.*, 260 F.3d 881, 884 (8th Cir. 2001) (applying Iowa law); *Institute for Shipboard Educ. v. Cigna Worldwide Ins. Co.*, 22 F.3d 414, 425-26 (2d Cir. 1994) (applying Pennsylvania law); *National Farmers Union Prop. & Cas. Co. v. Farm & City Ins. Co.*, 2004 SD 124, 689 N.W.2d 619, 624 (S.D. 2004); *LeMars Mut. Ins. Co. v. Farm & City Ins. Co.*, 494 N.W.2d 216, 218-19 (Iowa 1992); *Atkinson v. Atkinson*, 254 Ga. 70, 326 S.E.2d 206, 214 (Ga. 1985).

This rule applies without regard to the terms of the policies' other-insurance clauses, because other-insurance clauses are an issue only "when two or more policies apply at the same level of coverage. An 'other insurance' dispute can only arise between carriers on the same level[;] it cannot arise between excess and primary insurers." *North River Ins. Co.*, 257 Cal.Rptr. at 132 (citations and internal quotation marks omitted); *see Allstate Ins. Co. v. Frank B. Hall & Co. of Ca.*, 770 P.2d 1342, 1347 (Co. Ct. App. 1989) (declining to require pro-rata contribution where other-insurance clauses were mutually repugnant, because that "rule has generally not been applied when one of the clauses is contained within what would otherwise be a primary policy . . . and the other is contained within a policy that is designed to be an excess or umbrella policy"); 15 Russ & Segalla, *Couch on Insurance* § 218:5 ("An 'other insurance' dispute cannot arise between primary insurers and true excess insurers."). Accordingly, in a priority dispute between a true excess insurer and a primary or coincidental excess insurer, the policies' other-insurance clauses simply are not relevant, and there is no reason to consider whether the other-insurance clauses may be reconciled or must be set aside as mutually repugnant. *See General Star Nat'l Ins. Co. v. World Oil Co.*, 973 F. Supp. 943, 949 (C.D. Cal. 1997) ("When a policy is excess to another policy, there is no need to analyze the 'other insurance' clauses in either of the policies. Because an excess or secondary policy, by its own terms, does not apply to cover a loss until the underlying primary insurance has been exhausted, an examination of other insurance clauses to determine the relative rights and responsibilities of the parties is unnecessary where the policies do not provide the same level of protection." (citation and alteration

omitted)); *National Farmers Union Prop. & Cas. Co.*, 689 N.W.2d at 624 (concluding that true excess policy was last in priority of payment even though the primary insurance policy had a broad other-insurance clause: "Competing 'other insurance clauses' . . ., which normally would invoke contract construction rules, must yield to a finding of the insurance policies' main functions."); *accord National Sur. Corp.*, 260 F.3d at 884; *Cigna Worldwide Ins. Co.*, 22 F.3d at 426; *Langreck*, 816 N.E.2d at 493.

If this general rule--that true excess insurance is always excess over a policy providing primary coverage--applies in West Virginia, then the district court erred by looking to the language of the policies' other-insurance clauses rather than to the nature of the insurance coverage provided by the policies. As noted above, West Virginia courts have not yet addressed this issue. General Star, however, contends that this court has already predicted that West Virginia would follow the general rule that true excess coverage is always excess to coverage provided in a primary insurance policy. *See Allstate Ins. Co. v. American Hardware Mut. Ins. Co.*, 865 F.2d 592 (4th Cir. 1989).

In *Allstate*, a car owned by the Chrysler Corporation and leased to a dealer was involved in an accident. Liability coverage for the car was provided by policies issued by Continental Insurance and American Hardware Insurance. A true excess policy[4] issued to Chrysler by Allstate also provided coverage for the car. There was no dispute that the Continental policy provided primary coverage that must be exhausted before coverage from the other policies would become applicable; the question was the order of priority

between the Allstate and American Hardware policies. The American Hardware policy was a "garage operations" policy that provided primary liability insurance to the dealer for claims arising from its garage operations. The policy, however, included a provision that made its coverage excess for covered claims involving a car that was not owned by the dealer. Because the Allstate policy also included an excess other-insurance clause, the district court concluded that the excess other-insurance clauses in the policies were mutually repugnant and that any loss above the limits of the Continental policy should be prorated between Allstate and American Hardware. *See id.* at 593.

> On appeal, we noted that the overwhelming weight of authority held that "primary policies with excess clauses must be exhausted before the carrier of an umbrella policy will be required to pay." *Id.* at 594. We concluded that West Virginia would follow the same rule, and we therefore reversed the district court's ruling:
>
> [T]he Allstate policy is purely excess in nature. It is a classic umbrella policy and can therefore never provide primary coverage. Rather, it encompasses all the potential liabilities which Chrysler might incur and provides an additional source of funds for liabilities in excess of the underlying policies' coverage. The issuance of the umbrella policy in the present case was conditioned upon the existence of 13 different underlying policies protecting Chrysler from liability in almost any imaginable circumstance.

> In contrast, the American Hardware policy is essentially a policy of primary coverage. It is a "garage operations" policy and provides Greenbrier with primary coverage for all liabilities arising from its operations. However, in the event that liability should result from the use of a non-owned automobile, the American Hardware policy states that it will provide only excess coverage. Consequently, in the instant case American Hardware purports to be a secondary carrier even though it has issued essentially a primary policy to Greenbrier. . . . Since American Hardware is in most instances a primary policy, its limits should be exhausted before Allstate is required to contribute.

Id. at 594-95.

In our view, *Allstate* represents a straightforward application of the true-excess-is-always-excess rule urged by General Star. The district court in *Allstate* had approached the case by comparing the language of the other-insurance clauses and determining that the clauses were "mutually repugnant and must be disregarded." *Id.* at 593. We reversed the district court not because we believed that the other-insurance clauses in fact could be reconciled, but because we believed that West Virginia would follow the majority rule that "purported conflicts" between a true excess insurer and an insurer that provided "essentially primary coverage" made excess by virtue of a contract provision must be resolved in favor of the true excess insurer. *Id.* at 594. Our holding thus was premised on the nature of the policies at issue, not on the language of the other-insurance clauses. *See id.* at 594-95.

Because the West Virginia courts still have not directly addressed this issue, we believe that *Allstate*'s prediction of West Virginia law must control the disposition of this appeal.[5]

Horace Mann, however, contends that *Allstate* is distinguishable and does not control the resolution of this appeal. Horace Mann seems to suggest that *Allstate* is inapplicable because it involved a primary automobile liability policy that was rendered excess by virtue of a non-owned vehicle clause. *Allstate* did involve automobile liability insurance, as do many of the cases applying the general true-excess-is-always-excess rule. The general rule, however, is not dependent on the wording of the non-owned vehicle clause or on any other contract provision that is peculiar to automobile policies. The rule is based on a consideration of the nature of primary and excess liability insurance policies generally, regardless of whether the policies provide coverage for automobile liability or liability arising from a different source.

Horace Mann also finds it significant that the excess insurance policy in *Allstate* was voluntarily purchased, whereas the excess coverage provided by General Star was part of a package of insurance that West Virginia county school boards are statutorily obligated to carry. We fail to see how the outcome of this appeal is affected by the mandatory nature of the General Star insurance. The statute simply requires that primary and excess liability insurance of specified amounts must be carried; it does not speak to questions of priority between concurrent policies. *See* W. Va. Code § 29-12-5a(c). Accordingly, it is in no way inconsistent with West Virginia's statutory insurance scheme to require

Horace Mann's coverage limits to be exhausted before General Star's coverage is triggered. If anything, because the legislature is presumed to have knowledge of the common law relating to the subject matter of a statute, *see State ex rel. Fox v. Brewster*, 140 W. Va. 235, 84 S.E.2d 231, 244 (W. Va. 1954), the legislative silence on the question of priority suggests approval of the general rule that we apply in this case.

Horace Mann's other efforts at distinguishing *Allstate* revolve around the language and effect of its and General Star's other-insurance clauses. Horace Mann first suggests that the other-insurance clauses at issue in *Allstate*, when read together, indicated that the primary insurance should be exhausted first, while "the overall insuring schemes of the policies at issue [in this case] demonstrate that the Horace Mann policy is contractually excess to the General Star policy." Brief of Appellee at 17. As discussed above, however, the *Allstate* court applied the true-excess-is-always-excess rule, a rule that applies without regard to language of the other-insurance clauses. Horace Mann therefore cannot avoid *Allstate* by arguing that application of the other-insurance clauses in this case would yield a different result.[6]

Horace Mann also argues that the primary policy in *Allstate* was always intended to provide primary coverage (except when a non-owned vehicle was involved), while its policy, as evidenced by the language in its other-insurance policy, "can never be primary[7] to any other policy," Brief of Appellee at 17, and "was always intended to provide excess coverage," *id.* at 22. Though couched in terms of distinguishing *Allstate*, Horace Mann's argument is more of a challenge to the

characterization of its policy as a primary liability policy or a coincidental excess policy. In any event, the argument is without merit.

Horace Mann is probably correct that there is a factual difference between its level of exposure and the level of exposure in *Allstate* of the garage policy insurer, whose policy limits we concluded must be exhausted before the true excess insurer could be required to contribute. That is, the issuer of the garage operations policy in *Allstate* likely would have expected that most claims under the policy would trigger its primary coverage obligations rather than the excess coverage available when a non-owned vehicle was involved. As we have previously discussed, it is likely that most of the claims asserted under Horace Mann's policy by West Virginia NEA members will require Horace Mann to function only as an excess insurer. We simply cannot conclude, however, that this factual distinction has any legal significance.

We have already set out the governing legal principles: Horace Mann's policy as written provides primary coverage and contains none of the hallmarks of a true excess policy. While its other-insurance clause makes the policy coverage excess if other insurance also covers the loss, an excess other-insurance contained in a policy that provides primary insurance does not transform that policy into a true excess liability policy. And in a priority dispute between a true excess insurer and a coincidental excess insurer, the true excess insurer wins. The limits of the coincidental excess policy must be exhausted before coverage is triggered under the true excess policy. By arguing that it never expected to provide anything other than excess

coverage and that its expectation is relevant to the priority issue we face, Horace Mann is effectively asking this court to carve out an exception to these well-established principles. Horace Mann would have this court conclude that there is another category of insurance (in addition to true excess insurance and coincidental excess insurance), a category that should perhaps be referred to as just-barely-coincidental excess insurance, because there will hardly ever be a situation where the insurance will operate as primary rather than excess, and would have us treat this just-barely-coincidental excess insurance as if it were true excess insurance. We decline this invitation.

Horace Mann cites nothing in support of its view of the relevancy of the theoretical frequency that offered primary coverage will actually be triggered, and we have found no case that contemplates the possibility that the general rules would not apply to a policy like Horace Mann's. Horace Mann could have obtained the result it seeks by writing a true excess policy for West Virginia NEA members, but it chose instead to write a policy that by its plain terms offers primary liability coverage. Because the Horace Mann policy offers primary liability coverage, we see no reason to except it from the rule that the limits of policies providing primary liability insurance must be exhausted before the coverage of a true excess policy is triggered. We have already predicted that the West Virginia Supreme Court will follow this nearly universally accepted rule. *See Allstate*, 865 F.2d at 595. But even if we were not bound by *Allstate*'s prediction of West Virginia law, we do not believe that the West Virginia Supreme Court would see fit to create a previously unknown exception to the general rule in order to insulate Horace Mann

from the effect of its decision to write a primary liability insurance policy.

III.

To summarize, we conclude that the policy issued by General Star is a pure excess policy, while the Horace Mann policy provides primary liability coverage that becomes excess coverage by virtue of its other-insurance clause. Because the General Star policy is a pure excess policy, we must follow the general rule (as applied in *Allstate Ins. Co. v. American Hardware Mut. Ins. Co.*, 865 F.2d 592 (4th Cir. 1989)) that the limits of a policy that provides primary insurance must always be exhausted before coverage under the true excess policy is triggered.[8] Accordingly, we hereby reverse the order of the district court and remand for entry of judgment declaring the General Star policy excess to the Horace Mann policy.

REVERSED AND REMANDED

Footnotes

[1]Excess insurance may also be designed to operate above another excess policy. In such a case, coverage under a second-layer excess policy would be triggered only after the limits of the first-layer excess policy have been exhausted.

[2]Horace Mann's other-insurance clause also provides for pro-rata contribution in the event there is some other excess policy to which the Horace Mann policy would *not* be considered excess.

[3]As mentioned above, the Horace Mann policy provides for reimbursement for a bail bond premium and reimbursement for attorney's fees incurred in a successful defense against criminal charges. It seems unlikely that such coverage would be provided by the other insurance that might be available to Horace Mann policy holders, such as the statutorily mandated insurance for school boards, or homeowner's insurance. Thus, it may well be that the Horace Mann policy would provide primary coverage in these areas even when other insurance exists. *See* 15 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* § 219:14 (3d ed. 2005) ("It is generally held that in order for an other insurance clause to operate in the insurer's favor, there must be both an identity of the insured interest and an identity of risk. . . . The rule that the risks be identical in order for an 'other insurance' clause to apply does not mean that the total possible coverage under each policy be the same, but merely that with respect to the harm which has been sustained there be coverage under both policies." (footnotes omitted)).

[4]We referred to the excess policy as an "umbrella" policy, a term that is often used to describe a pure excess policy. *See Allstate Ins. Co. v. American Hardware Mut. Ins. Co.*, 865 F.2d 592, 593 (4th Cir. 1989). Umbrella policies, however, may provide coverage not available under a typical pure excess policy. In addition to excess coverage for risks covered by an underlying insurance policy, some umbrella policies offer primary liability coverage for certain risks not covered by the underlying policy. *See, e.g., Coleman Co., Inc. v. California Union Ins. Co.*, 960 F.2d 1529, 1530 n.1 (10th Cir. 1992). The policy at issue in *Allstate*, however, was a pure excess policy; it offered no

primary coverage for any risk. *See Allstate*, 865 F.2d at 593.

[5]Even without *Allstate*, we would predict that West Virginia would follow the true-excess-is-always-excess rule. Horace Mann does not dispute the substance or wisdom of the general rule, but argues only that the rule does not apply to this case. And while the rule is frequently described as being the majority rule, Horace Mann does not point to any case where a court has rejected the rule. *Cf. Monroe Guar. Ins. Co. v. Langreck*, 816 N.E.2d 485, 492-93 (Ind. App. 2004) (characterizing the true-excess-is-always-excess rule as a "*practically universal rule* in jurisdictions that have addressed the issue"). Moreover, the rule is advocated by the authors of the leading treatises on insurance law, *see* 15 Russ & Segalla, *Couch on Insurance* § 218:5 ("An 'other insurance' dispute cannot arise between primary insurers and true excess insurers."); 8A John A. Appleman & Jean Appleman, *Insurance Law and Practice* § 4909.85 (1981) ("Umbrella coverages, almost without dispute, are regarded as true excess over and above any type of primary coverage . . . ."), treatises to which the West Virginia Supreme Court has looked for guidance when resolving insurance issues, *see, e.g.*, *West Virginia Fire & Cas. Co. v. Mathews*, 209 W. Va. 107, 543 S.E.2d 664, 670 (W. Va. 2000) (*citing Couch*); *Erie Ins. Prop. & Cas. Co. v. Stage Show Pizza, JTS, Inc.*, 210 W. Va. 63, 553 S.E.2d 257, 262 (W. Va. 2001) (citing Appleman and Couch).

[6]We note that Horace Mann misconstrues the scope of General Star's other-insurance clause. In our view, the clause is properly understood as a recognition that the insured might buy secondary excess insurance--

insurance that operates as excess to General Star's excess policy. *See National Farmers Union*, 689 N.W.2d at 623 (concluding that other-insurance clause contained in true excess policy which stated that the policy would not be excess to "insurance bought to apply in excess of the retained limit of liability plus the limit of liability of this policy" referred to a third layer of insurance coverage); *Allstate Ins. Co. v. Frank B. Hall & Co. of Ca.*, 770 P.2d 1342, 1347 (Colo. Ct. App. 1989) (concluding that "the reference in the umbrella coverage's excess clause to a policy 'that is specifically stated to be in excess' of that policy refers to a third tier of insurance that treats the umbrella coverage as underlying insurance and specifically refers to that coverage. This proviso does not refer to primary liability insurance that merely has a standard excess clause."). That General Star contemplated the possibility of another true excess policy being excess to its coverage does not mean that it contemplated that a policy providing *primary* coverage would be excess to its policy.

[7]We also note that in no event is Horace Mann providing *primary* liability coverage in this case; primary coverage was provided under the National Union Fire Insurance Company policy. The question in this appeal is whether Horace Mann or General Star must bear responsibility for the amount of the settlement in excess of the limits of the primary insurance.

[8]Our disposition of this issue makes it unnecessary to consider the other issues raised by General Star.

DISSENT BY: NIEMEYER

DISSENT

NIEMEYER, Circuit Judge, dissenting:

I

During the 2002-2003 school year, a high school teacher in West Virginia's Lincoln County School District sexually abused a student, and the student's parents sued the teacher, the school board, and several school system employees, including the school's principal.

National Union Fire Insurance Company ("National Union"), the school board's primary insurance carrier, paid the limits of its $ 1 million policy to settle the parents' claim, and General Star National Insurance Company ("General Star"), the school board's excess carrier, contributed a portion of its $ 5 million excess coverage to the settlement. This action addresses whether General Star has a right to obtain reimbursement from Horace Mann Insurance Company ("Horace Mann"), which had underwritten an insurance policy covering members of the West Virginia Education Association personally, including the school principal in this case.

The district court, considering the language of both the General Star policy and the Horace Mann policy, concluded that the "other insurance" provisions of the two policies were reconcilable and accordingly applied them so that the Horace Mann policy was excess over the General Star policy. The court noted that the language of the Horace Mann policy specifically defined its coverage to be excess over the General Star policy and that the General Star policy explicitly

accommodated this order of coverage, providing that it was *not* an excess policy over another policy that provided it was an excess policy over the General Star policy.

I agree with the district court's common sense reading of the plain language of the two policies and its conclusions that they are not in conflict. Therefore, I conclude that no extra-contractual insurance principles developed to resolve *conflicts* among policies need to be applied to determine the order of their coverage.

II

Rather than applying the language of the policies, the majority attempts to assign the policies at issue to generalized classifications and then to apply general rules of court-made law to resolve *conflicts* among policy classifications. To this end, the majority devotes pages to defining the classifications to which it might assign the policies and how each classification might change with the inclusion of a different type of "other-insurance" clause. The generalized classifications identified by the majority include: "a primary policy," "an excess policy," "policies with 'other insurance clauses' taking the form of a pro-rata clause, an escape clause, or an excess clause," "a primary liability insurance policy that contains an excess other-insurance clause," "a coincidental excess policy," "a true excess or pure excess policy," and an "umbrella policy." And then, after spending pages defining these general classifications, the majority attempts to fit the policies in this case within one classification or another. It concludes that the Horace Mann policy is a "coincidental excess policy" and that the General Star policy is a "true

excess policy." It then assumes that these classifications conflict and, without considering whether the policies do in fact conflict, predicts that West Virginia would resolve the conflict in favor of General Star, even as it acknowledges that no West Virginia case has so held. As to whether it should consider the policy language, the majority states:

> Accordingly, in a priority dispute between a true excess insurer and a primary or coincidental excess insurer, the policies' other-insurance clauses *simply are not relevant, and there is no reason to consider whether the other-insurance clauses may be reconciled* or must be set aside as mutually repugnant. (Emphasis added). To predict what West Virginia might do, the majority relies on our holding in *Allstate Insurance Co. v. American Hardware Mutual Insurance Co.*, 865 F.2d 592 (4th. Cir. 1989), which held that when two policies conflict, the true excess insurance is always excess over a policy providing primary coverage, regardless of the language of the policies.

The jurisprudence of the majority's decisionmaking is a remarkable creation for this case, especially in view of its acknowledgment, when describing the generally applicable principles of law, that "where the other-insurance clauses can be reconciled, the clauses will be enforced in accordance with their terms." Rather than attempting to apply this principle and reconcile the clauses, however, the majority concludes from its classification system that the policies cannot be reconciled. Accordingly, it applies the inappropriate proposition that when in conflict, an excess policy is

always secondary to a primary policy. Using this methodology, it reaches the conclusion that General Star wins and so reverses the district court's judgment.

Had the majority taken the relevant insurance policies as contracts and applied them *as written*, it would undoubtedly have reached the same conclusion that the district court reached.

III

The policies in this case were issued against the statutory backdrop of the West Virginia Code, which requires specified insurance for school systems and public school employees. In West Virginia, all county boards of education are required by law to have at least $ 1 million of primary liability insurance coverage and $ 5 million of excess coverage. *See* W. Va. Code § 29-12-5a. In particular, the statute requires that the West Virginia Board of Risk and Insurance Management purchase such insurance on behalf of all boards of education and their employees, and it requires that the county school boards pay the premiums for the excess policy. *Id.* § 29-12-5a(c). Moreover, each insurance company providing insurance under this mandate must be licensed to do business in West Virginia. *Id.* For the Lincoln County Board of Education's 2002-2003 school year, the statutorily required insurance package consisted of a primary policy issued by National Union, covering losses up to $ 1 million, and an excess policy issued by General Star, covering losses greater than $ 1 million, up to an additional $ 5 million. For persons in the education and insurance fields in West Virginia, these requirements were well known and well understood.

Recognizing this system of mandated insurance, the West Virginia Education Association obtained a supplemental policy from Horace Mann, which provided personal coverage for the members of the Association, including the school principal in this case. The Horace Mann policy explicitly stated that it was a low-cost policy providing personal protection to members over and above the state-mandated insurance for public school employees.

In this case, after National Union paid its policy limits to settle with the parents of the abused student and General Star paid the remainder of the settlement amount, General Star sought to obtain reimbursement for the amounts it paid from Horace Mann. Horace Mann denied that it had a duty to reimburse General Star because its policy was excess over General Star's policy, and it commenced this action seeking a declaratory judgment that its coverage was excess over General Star's policy and that General Star's policy limits had to be exhausted before Horace Mann would become obligated to contribute any amount. In response, General Star counterclaimed for a declaratory judgment favoring its position, and it also sought a money judgment compensating it for the portion of the underlying settlement it paid to the parents.

On cross-motions for summary judgment, the district court granted Horace Mann's motion, declaring that the coverage provided by the Horace Mann policy was unambiguously excess over the coverage provided by the General Star policy and that the coverage limits of the General Star policy had to be exhausted before Horace Mann became obligated to contribute. Because

General Star's coverage limits were not exhausted in this case, the court did not order any contribution from Horace Mann.

I believe that the district court had it exactly right. The order of coverage provided by these policies is dictated by the unambiguous "other insurance" clauses contained within each policy, and in this case those clauses do not conflict; indeed, they accommodate each other. The "other insurance" clause of the Horace Mann policy begins:

> This is a manuscript contract and is personal to the individual Insured named herein. *It was written and priced to reflect the intent of all parties that this policy is in excess of any and all other insurance policies, insurance programs, self-insurance programs,* and defense and indemnification arrangements *whether primary, excess, umbrella or contingent* and whether collectible or not, to which the Insured is entitled or should have been entitled, by contract or operation of law, to coverage or to payment including, but not limited to, payment of defense and/or indemnification.

(Emphasis added). The Horace Mann "other insurance" clause goes on to provide specifically that it was excess over the policies purchased by educational units in West Virginia to insure against liability arising from activities of the educational unit or its employees, regardless of whether that educational insurance provided primary or excess coverage. As the policy language specifies:

Further, *it is the intent of the parties that the coverage afforded in this policy does not apply if the Insured has other valid and collectible insurance of any kind whatsoever whether primary or excess,* or if the Insured is entitled to defense or indemnification from any other source whatsoever, including by way of example only, such sources as state statutory entitlements or provisions, except any excess beyond the amount which would have been payable under such other policy or policies or insurance program or defense or indemnification arrangement had this policy not been in effect. *Other valid and collectible insurance includes, but is not limited to, policies or insurance programs of self-insurance purchased or established by or on behalf of an educational unit to insure against liability arising from activities of the educational unit or its employees, regardless of whether or not the policy or program provides primary, excess, umbrella, or contingent coverage.*

* * *

This policy is specifically excess over coverage provided by school district or school board. . . general liability policies purchased by the Insured's employer or former employer and it is specifically excess over coverage provided by any School Leaders Errors and Omissions Policy purchased by the Insured's employer or former employer and it is specifically excess over coverage provided by any policy of insurance which purports to be excess to or recites that it

> is excess to a policy issued to the Insured for the benefit of members of the National Education Association.

(Emphasis added). It is apparent from this language and the statutory mandate for insurance that the West Virginia Education Association was purchasing a supplemental policy for its members to provide backstop coverage beyond that provided by National Union and General Star to the school board and its employees under state statutory requirements. This is the explicitly stated posture of the Horace Mann policy--to provide coverage in excess of the coverage provided by "an educational unit to insure against liability arising from activities of the educational unit or its employees." Moreover, the policy explicitly refers to the state statutory provisions providing for the underlying insurance. Because the General Star policy is incontrovertibly the policy issued pursuant to West Virginia's mandate to have $5 million of excess coverage for school boards and school employees, the Horace Mann policy thus provides it is excess over that policy.

In addition to policy language, the structure of insurance coverage for principals and teachers in West Virginia confirms Horace Mann's posture as the ultimately excess policy. All public school principals and teachers in West Virginia are covered by the statutorily mandated insurance for the first $6 million of liability as provided by National Union for primary coverage and General Star for excess. By indicating that it is excess over insurance provided through "such sources as state statutory entitlements or provisions" and "purchased or established by or on behalf of an

educational unit," the Horace Mann policy clearly was referencing that it was excess over the $ 6 million of insurance required by West Virginia law and provided by National Union and General Star.

> The language of General Star's policy does not conflict with Horace Mann's order of coverage. To the contrary, it explicitly accommodates Horace Mann's policy as a policy excess over its own in its "other insurance clause." The General Star "other insurance" clause provides:
>
> If other valid and collectible insurance with any other insurer is available to the Insured covering a loss also covered by this Policy, *other than insurance that is in excess of the Insurance afforded by this Policy*, the insurance afforded by this Policy shall be in excess of and shall not contribute with such other insurance.

(Emphasis added). In the "other than" clause, the General Star policy explicitly recognizes that other insurance *can* in fact be excess over it when the other insurance provides that it is excess over the General Star policy. As I already noted, Horace Mann explicitly made its coverage excess over the General Star policy and therefore General Star's "other insurance" clause accommodates the order specified in the Horace Mann policy.

It is thus clear that the insurers involved understood the overall insurance scheme, with General Star and National Union providing the $ 6 million of coverage mandated by statute and with Horace Mann providing supplemental coverage over the statutorily mandated

insurance. As the Horace Mann policy stated, it was offered to West Virginia Education Association members and priced "to reflect the intent of all parties" that it was intended *only* to be "in excess of any and all other insurance policies," to provide members with protection against a potential loss of assets in the face of an astronomically high judgment exceeding the other statutorily mandated insurance.

Under West Virginia law, when we decide a case "concerning the language employed in an insurance policy," we must "look to the precise words employed in the policy of coverage." *Horace Mann Ins. Co. v. Adkins*, 215 W. Va. 297, 599 S.E.2d 720, 724 (W. Va. 2004). Moreover, we should give the language "its plain, ordinary meaning." *Id.* (internal quotation marks and citation omitted). In this case the district court read the policies and concluded that

[T]he language of both Horace Mann's and General Star's other insurance provisions is unambiguous. Further, in applying the plain and ordinary meaning of the words used in those provisions, the Court concludes that, as written, the coverage provided by Horace Mann's policy is unambiguously excess to the coverage provided by the policy issued by General Star. I agree.

In addition to refusing to consider the policy language, the majority also misapplies our decision in *Allstate Insurance Co. v. American Hardware Mutual Insurance Co.*, 865 F.2d 592 (4th Cir. 1989). In *Allstate* we held that the rules generally governing *conflicts* between "other insurance" clauses do not apply when one of the policies at issue is a true excess policy and any other policy is a primary liability policy. *Id.* at 595.

In the usual case, where two or more "other insurance" clauses are in *conflict*, the clauses should be ignored and the policies applied pro rata. *See Md. Cas. Co. v. Cont'l Cas. Co.*, 189 F. Supp. 764, 772-74 (N.D. W. Va. 1960). Our decision in *Allstate* merely changed this rule in one specific set of circumstances where there are conflicting "other insurance" clauses and where one policy is a true excess policy and the other a primary policy. Instead of requiring proration, we required, in the automobile context, that the primary policy be exhausted before the excess policy is applied.

But the *Allstate* rule applies only to resolve *conflicting* "other insurance" clauses. When there is no conflict among such clauses, it remains the governing law in West Virginia that "[l]anguage in an insurance policy should be given its plain, ordinary meaning." *Horace Mann*, 599 S.E.2d at 724 (internal quotation marks omitted). Indeed, "[w]here provisions in an insurance policy are plain and unambiguous and where such provisions are not contrary to a statute, regulation, or public policy, the provisions will be applied and not construed." *Id.*

Because the reading of the General Star and Horace Mann policies at issue in this case reveals that they are *not in conflict*, we should move no further than declaring that their intent and effect are clear and, therefore, that application of the rules set forth in *Allstate* are inappropriate. I would accordingly affirm.

CIVIL ACTION NO. 1:04-CV-163

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF WEST VIRGINIA,
CLARKSBURG DIVISION

HORACE MANN INSURANCE COMPANY,
Plaintiff

v.

GENERAL STAR NATIONAL INSURANCE
COMPANY, Defendant

September 29, 2006, Decided

September 29, 2006, Filed

COUNSEL: For Horace Mann Insurance Company, Plaintiff: Daniel C. Cooper, Steptoe & Johnson, PLLC - Clarksburg, Clarksburg, WV; Jamison H. Cropp, Steptoe & Johnson, PLLC - Clarksburg, Clarksburg, WV.

For General Star National Insurance, Company, Defendant: Jeffrey A. Holmstrand, McDermott & Bonenberger, PLLC, Wheeling, WV.

For General Star National Insurance Company, Counter Claimant: Jeffrey A. Holmstrand, McDermott & Bonenberger, PLLC, Wheeling, WV.

For Horace Mann Insurance Company, Counter Defendant: Daniel C. Cooper, Steptoe & Johnson,

PLLC - Clarksburg, Clarksburg, WV; Jamison H. Cropp, Steptoe & Johnson, PLLC - Clarksburg, Clarksburg, WV.

JUDGES: IRENE M. KEELEY, UNITED STATES DISTRICT JUDGE.

OPINION BY: IRENE M. KEELEY

OPINION

MEMORANDUM OPINION AND ORDER

This insurance coverage dispute arises from the settlement of a lawsuit in which the parents of a Lincoln County, West Virginia, public school student sued several employees of the school district for the negligent supervision of a teacher who sexually assaulted their child during the 2002-2003 school year. The suit was settled by the Lincoln County Board of Education, and the settlement was paid by the Board's two insurers. One of those insurers, the defendant, General Star National Insurance Company ("General Star"), subsequently sought contribution from a third insurer, the plaintiff, Horace Mann Insurance Company ("Horace Mann") which had underwritten an employment general liability policy that personally covered one of the defendants, the school principal, David Bell ("Bell").

Pursuant to 28 U.S.C. § 2201, *et seq.*, Horace Mann brought this action seeking a declaration that its coverage is excess to that of General Star, and that, as such, the coverage provided by General Star's policy must be completely exhausted before Horace Mann is

obligated to contribute any amount. In answering Horace Mann's complaint, General Star counterclaimed for both a declaration defining the parties' rights and obligations, and also a money judgment compensating General Star for the portion of the underlying settlement it alleges Horace Mann was obligated to cover. Subsequently, the parties filed cross motions for summary judgment and declaratory relief, which are ripe for decision.

For the reasons that follow, the Court **GRANTS** Horace Mann's motion for summary judgment, **DENIES** General Star's motion for summary judgment, and **DECLARES** that the coverage provided by the Horace Mann policy is unambiguously excess to the coverage provided by the General Star policy. Thus, the coverage limits of General Star's policy must be exhausted before Horace Mann is obligated to contribute to any settlement.

I. Factual and Procedural Background

Pursuant to W.Va. Code § 29-12-5a (2000), on behalf of all county boards of education and their employees, the state Board of Risk and Insurance Management must purchase at least one million dollars of primary liability insurance coverage, as well as at least five million dollars of excess coverage. For the Lincoln County Board of Education's 2002-2003 school year, that statutorily-required insurance package consisted of a primary policy issued by the National Union Fire Insurance Company ("National Union")[1] and an excess policy issued by General Star[2]. Sometime during that school year, a high school teacher in the Lincoln County school system sexually abused a student, and, in

January, 2004, the child's parents sued the teacher, the Board and several school system employees, including Bell, the school principal. In April 2004, the parties settled the suit for an undisclosed sum above National Union's one million dollar primary policy limit and within General Star's additional five million dollar excess limit.[3]

Although General star contributed to the settlement, it later sought contribution from Horace Mann, an insurer whose policy of employee liability insurance covered members of the West Virginia Education Association, including defendant Bell.[4]

II. Standards of Review

A motion for summary judgment should be granted when the record reveals that there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

Further, in almost any case over which it has jurisdiction, a federal district court may "declare the rights and other legal relations of any interested party seeking such declaration, whether or not any further relief is or could be sought." 28 U.S.C. § 2201; see also F.R.Civ.P. 57.

III. Discussion

There is no dispute of material fact about the incidents giving rise to the underlying civil action and its subsequent settlement, which involved a combination of

insureds covered under three separate policies written by National Union, General Star and Horace Mann, respectively. Further, it is undisputed that National Union's policy provided primary liability coverage on the underlying claims; thus, the only issue before the Court is the proper priority of coverage between the policies of General Star and Horace Mann on the claims against defendant Bell. That determination is a question of law. Syllabus point 1, *Tennant v. Smallwood*, 211 W. Va. 703, 568 S.E.2d 10 (W.Va. 2002)("[d]etermination of the proper coverage of an insurance contract when the facts are not in dispute is a question of law").

Each insurer argues that its policy is excess to that of the other. Horace Mann contends that a comparison of the plain language of its "other insurance" provision with that of General Star establishes the "super-excess" status of its policy and the "simple excess" status of General Star's policy. Alternatively, Horace Mann asserts that, because West Virginia statutory law requires political subdivisions to indemnify their employees against damages arising from their employment, and because insurers stand in the shoes of their insureds, it cannot be required to contribute to General Star as the Board's insurer because the Board is required to indemnify David Bell.

General Star argues that the language of Horace Mann's other insurance provision is ambiguous and contains an "escape" clause, warranting a finding that its policy is excess to Horace Mann's policy. General Star also argues that, pursuant to the "Allstate Rule," its policy is excess because it is a "true excess" or "umbrella" policy, while Horace Mann's policy contains

a duty to defend and could provide primary coverage to the insured in certain situations.

Under West Virginia law, when a court decides a case "concerning the language employed in an insurance policy, [it must] look to the precise words employed in the policy of coverage." *Horace Mann Insurance Company v. Adkins*, 215 W. Va. 297, 599 S.E.2d 720, 724 (W.Va. 2004). Thus, before proceeding to analyze the parties' coverage arguments, the Court first will review the relevant policy language in the parties' respective insurance contracts.

A. Policy Language

The insurance policy issued to the members of the West Virginia Education Association, including David Bell, by Horace Mann provides in pertinent part:

> Coverage A -- Educators Liability
>
> $ 1,000,000 per member per occurrence not to include any civil rights issues or claims
>
> * * *
>
> NEA EDUCATORS EMPLOYMENT LIABILITY CONTRACT
>
> * * *
>
> I. INSURING AGREEMENTS
>
> Horace Mann Insurance Company, called HMIC in this contract, agrees to provide the Insured . .

. with the coverages shown on the declarations page in return for the payment of the premium and subject to the limits of liability, exclusions, conditions and all other terms of this contract.

* * *

III. COVERAGES

Subject to the exclusions, conditions, limits of liability and other terms of this contract:

A. COVERAGE A -- EDUCATORS LIABILITY. HMIC agrees to pay on behalf of the Insured any and all loss, subject to the limit of liability. . . . Such loss must be sustained by the **Insured** by reason of liability imposed by law for damage caused by an **occurrence** in the course of the **Insured's educational employment activities.**

* * *

VIII. CONDITIONS

* * *

I. OTHER INSURANCE. This is a manuscript contract and is personal to the individual named herein. It was written and priced to reflect the intent of all parties that this policy is in excess of any and all other insurance policies, insurance programs, self-insurance programs, and defense and indemnification arrangements whether primary, excess, umbrella or contingent and

whether collectible or not, to which the **Insured** is entitled or should have been entitled, by contract or operation of law, to coverage or to payment including, but not limited to, payment of defense and/or indemnification. Further, it is the intent of the parties that the coverage afforded in this policy does not apply if the **Insured** has other valid and collectible insurance of any kind whatsoever whether primary or excess, or if the **Insured** is entitled to defense or indemnification from any other source whatsoeyer, including, by way of example only, such sources as state statutory entitlements or provisions, except any excess beyond the amount which would have been payable under such other policy or policies or insurance program or defense or indemnification arrangement had this policy not been in effect. Other valid and collectible insurance includes, but is not limited to, policies or insurance programs of self-insurance purchased or established by or on behalf of an **educational unit** to insure against liability arising from activities of the **educational unit** or its **employees** regardless of whether or not the policy or program provides primary, excess, umbrella, or contingent coverage. . . .

This policy is specifically excess over coverage provided by school district or school board errors and omissions or general liability policies purchased by the **Insured's** employer or former employer and it is specifically excess over coverage provided by any School Leaders Errors and Omissions Policy purchased by the **Insured's** employer or former employer and it is

> specifically excess over coverage provided by any policy of insurance which purports to be excess to or recites that it is excess to a policy issued to the Insured for the benefit of members of the National Education Association. . . .
>
> If it is determined that HMIC must contribute to the coverages provided in Section III of this contract with any other valid and collectible excess insurance, HMIC's contributing limit of liability shall be determined and paid as follows:. . . .

(Doc. No. 22-3.)

By contrast, the General Star policy issued to the West Virginia County Boards of Education provides, in pertinent part:

> I. COVERAGE
>
> The Company shall Indemnity [sic] the insured for **ultimate net loss** in excess of the **underlying insurance** . . . but not in excess of the Company's limits of liability. . . .
>
> II. APPLICATION OF UNDERLYING INSURANCE
>
> Except for the limits of liability and any provisions in the underlying insurance policy which are inconsistent with this Policy, including any endorsements attached here to, the terms conditions, agreements, definitions, exclusions and limitations of the **controlling underlying**

insurance policy are incorporated by reference as a part of this Policy.

* * *

DEFINITIONS

1. Controlling Underlying Insurance Policy

The term "Controlling Underlying Insurance Policy" means the insurance policy designated as such in Item 2 of the Declarations [i.e., the National Union policy].

* * *

5. Ultimate Net Loss

The term "Ultimate Net Loss" means the total of all sums which the insured, or any organization as its insurer, or both, shall become legally obligated to pay, whether by reason of adjudication or settlement, because of an occurrence covered under the terms of the **controlling underlying insurance policy** and to which this Policy applies: ultimate net loss shall include costs, but shall not include recoveries, salvages or other insurance except underlying insurance or insurance written specifically to apply in excess of this policy whether collectible or not.

6. Underlying Insurance

The term "Underlying Insurance", means the

primary or excess insurance policies contributing to the limit stated in Item 2 of the Declarations, including any deductible amount, insured's participation or self insured retention beneath any such policy, and includes any renewals or replacements thereof. The limits of such policies shall be deemed to be applicable regardless of (1) any defense which the underlying insurer may assert, (2) the insured's failure to comply with any condition of any such policy or

(3) the insolvency of the underlying insurer.

CONDITIONS

* * *

(C) Other Insurance

If other valid and collectible insurance with any other insurer is available to the insured covering a loss also covered by this Policy, other than insurance that is in excess of the insurance afforded by this Policy the Insurance afforded by this Policy shall be in excess of and shall not contribute with such other insurance[.] Nothing herein shall be construed to make this Policy subject to the terms, conditions, and limitations of other insurance, reinsurance or indemnity.

(Doc. No. 22-2.)

B. Analysis

The parties' arguments fall into three general

categories: 1) those based on the language of the respective policies; 2) those based on the type or nature of the respective policies; and 3) those based on statutory provisions of the West Virginia Code. The Court addresses each in turn below.

i. Arguments Based on Policy Language

Under West Virginia law, "[l]anguage in an insurance policy should be given its plain, ordinary meaning." *Adkins*, 599 S.E.2d at 724 (quoting Syl. pt. 1, *Soliva v. Shand, Morahan & Co., Inc.*, 176 W. Va. 430, 345 S.E.2d 33 (W.Va. 1986)). Further, "[w]here provisions in an insurance policy are plain and unambiguous and where such provisions are not contrary to a statute, regulation, or public policy, the provisions will be applied and not construed." Id. (quoting Syl. pt. 2, *Shamblin v. Nationwide Mut. Ins. Co.*, 175 W. Va. 337, 332 S.E.2d 639 (W.Va. 1985). However, "[w]henever the language of an insurance policy provision is reasonably susceptible of two different meanings or is of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning, it is ambiguous." Id. (quoting Syl. pt. 1, *Prete v. Merchants Prop. Ins. Co. of Indiana*, 159 W. Va. 508, 223 S.E.2d 441 (W.Va. 1976). Finally, "[i]t is well settled law in West Virginia that ambiguous terms in insurance contracts are to be strictly construed against the insurance company and in favor of the insured." Syl. Pt. 4, *National Mutual Insurance Company v. McMahon & Sons*, 177 W. Va. 734, 356 S.E.2d 488 (W.Va. 1987), overruled on other grounds by *Potesta v. U.S. Fidelity & Guar. Co.*, 202 W. Va. 308, 504 S.E.2d 135 (W.Va. 1998).

Here, Horace Mann contends that the plain language of its policy contains a "super-excess" provision establishing that it can "never be primary to **any** other policy." (Doc. No. 22-1 at 11)(emphasis in original). Specifically, the other insurance provision found in the Conditions section of Horace Mann's policy provides that the policy "was written and priced to reflect the intent of all parties that this policy is in excess of any and all other insurance policies, insurance programs, self-insurance programs, and defense and indemnification arrangements whether primary, excess, umbrella or contingent and whether collectible or not . . . ." (See, Doc. No. 22-3.)

According to Horace Mann, the plain language of General Star's other insurance provision constitutes a "simple excess" provision that, in contrast to Horace Mann's policy, recognizes that other policies may be excess to it. Specifically, the General Star policy provides: "If other valid and collectible Insurance with any other insurer is available to the Insured covering a loss also covered by this Policy, other than Insurance that is in excess of the Insurance afforded by this Policy, the Insurance afforded by this Policy shall be in excess of and shall not contribute with such other Insurance." (See, Doc. No. 22-2.) Thus, Horace Mann argues that, given the clear language of the policies' respective provisions, its policy is excess to that of General Star.

General Star contends that the "any and all" language on which Horace Mann relies is not controlling. According to General Star, that language constitutes a recital of intent and is not an obligatory term of the contract of insurance between Horace Mann and David

Bell. In support of its argument, it cites *Martin v. Rothwell*, 81 W. Va. 681, 95 S.E. 189, 190 (W.Va. 1918), where the West Virginia Supreme Court of Appeals stated: "[P]aragraphs in a contract containing recitals of the purposes and intentions of the parties thereto are not strictly speaking parts of the contract, unless adopted as such by reference thereto."

Horace Mann disputes that Martin's holding, that the preambulatory language of a contract is non-obligatory, applies to its policy because that language falls under the Conditions section of the insurance policy, thereby evincing "its obligatory nature." (Doc. No. 29 at 3.) While it is correct that the language at issue in Martin was located at the beginning of the contract, it should be noted that nothing in the holding of that case conditions the non-obligatory nature of recitals on their placement within a contract. See, Syl., 95 S.E. 189 (stating that, "[t]he obligation of the parties to a contract is not determined by the *recitals therein, or the preamble thereto*" (emphasis added)). Nevertheless, the gravamen of Horace Mann's argument focuses on the inclusion of the challenged language in a section of its policy that unambiguously limits the policy's coverage provisions.

In West Virginia, a recital of the intent of the parties under a contract may be obligatory if it is adopted as such by the parties in the contract. *Martin*, 95 S.E. at 190. In this case, Horace Mann's policy provides that "[i]t was written and priced to reflect the intent of all parties that this policy is in excess of any and all other insurance policies. . . ." The plain meaning of that language is that the Horace Mann policy was *written* to reflect the parties' intent that the coverage provided be

excess to all other insurance policies. Further, that language is found under the "Conditions" section of the policy, which, in turn, limits the policy's coverage provisions pursuant to the terms of the "Insuring Agreements" provision of the policy. Thus, in accord with Martin, the statement of intent in the Horace Mann policy was incorporated by reference into the body of the contract, and thus is obligatory.

General Star asserts as its next argument that additional language in the other insurance provision of the Horace Mann policy constitutes an "escape clause" which, under the prevailing "majority view", renders that policy primary to policies containing excess clauses such as that found in the General Star policy. The challenged language provides:

> [I]t is the intent of the parties that the coverage afforded in this policy does not apply if the **Insured** has other valid and collectible insurance of any kind whatsoever whether primary or excess, or if the **Insured** is entitled to defense or indemnification from any other source whatsoever, including, by way of example only, such sources as state statutory entitlements or provisions, except any excess beyond the amount which would have been payable under such other policy or policies or insurance program or defense or indemnification arrangement had this policy not been in effect.

(See, Doc. No. 22-3.)

The term "escape clause" is a term of art. It "allows a party to avoid performance under specified conditions .

. . ." Black's Law Dictionary 712 (8th ed. 2004). In the context of insurance, an escape clause is a policy provision, usually found in the policy's "other insurance" section, "requiring the insurer to provide coverage only if no other coverage is available." Id.; accord Appleman, Insurance Law and Practice § 2910 ("A basic escape clause provides that there shall be no coverage where there is other valid and collectible insurance. ").

To be an escape clause, the challenged language in Horace Mann's policy would have to disclaim any coverage if another policy also covered the insured. This it clearly does not do. Rather, the provision states that the policy "does not apply . . . *except* any excess" above the coverage provided by other applicable policies. (Emphasis added.) Thus, the challenged language is an excess, not an "escape", clause, that reads consistently with the language of the Horace Mann other insurance provision challenged as a recital.

General Star argues next that the Horace Mann "other insurance" provision is ambiguous because, although it provides that the policy's coverage is excess to "any and all other insurance policies," it also provides applicable apportionment terms in the event "it is determined that [Horace Mann] must contribute to the coverages provided in [the policy] with any other valid and collectible excess insurance." (Doc. 22-3 at 8.) According to General Star, if Horace Mann's policy were truly excess to all other insurance, there would be no need to provide apportionment terms in its policy. Thus, it asserts that the two provisions are incompatible and create an ambiguity that should be resolved against Horace Mann.

Horace Mann responds that the apportionment terms in its other insurance provision do not render the "super-excess" language of its policy ambiguous. Rather, a description of how contribution is to be effected under the policy is necessary in the event "an insured under the Horace Mann Policy were also covered by another policy of insurance which was super-excess in nature." (Doc. No. 25 at 11.) Horace Mann argues vigorously that such is not the case here, where the plain language of the respective policies' other insurance provisions establishes the primacy of General Star's "simple excess" coverage.

"Competing excess insurance clauses 'should be disregarded inasmuch as they are mutually repugnant and as against each other cannot be recognized.'" *American Safety Indem. Co. v. Stollings Trucking Co.*, 450 F. Supp. 2d 639, 2006 U.S. Dist. LEXIS 61561, 2006 WL 2507053, 9 (S.D.W.Va. 2006)(*quoting Allstate Insurance Co. v. Atlantic National Insurance Co.*, 202 F.Supp 85, 88 (S.D.W.Va. 1962)). As such, if a coverage dispute existed between Horace Mann's policy and another policy that provided it was excess to all other applicable insurance policies, the policies' mutually repugnant excess insurance provisions would cancel out one another and give rise to the question of apportionment, thereby implicating the apportionment terms in the Horace Mann other insurance provision. In the absence of mutually repugnant provisions, however, the apportionment terms of the Horace Mann other insurance provision are not implicated and no conflict or ambiguity is created with the policy language providing for coverage excess to "any and all other insurance policies."

In its final challenge based on policy language, General Star contends that the inclusion of both general and specific terms in Horace Mann's other insurance provision renders that provision ambiguous, thereby requiring the Court to restrict the construction of the general terms in that provision to a meaning derived from the accompanying specific words. *See Change, Inc. v. Westfield Ins. Co.*, 208 W. Va. 654, 542 S.E.2d 475, 478-79 (W.Va. 2000)(discussing the doctrines of *ejusdem generis* and *noscitur a sociis*, and finding that "their application holds that in an ambiguous phrase mixing general words with specific words, the general words are not construed broadly but are restricted to a sense analogous to the specific words"). According to General Star, the language in the Horace Mann other insurance provision providing for coverage that is excess to "any and all other insurance policies" is restricted by later language in that same provision providing for coverage that is "specifically excess" to certain enumerated types of policies that do not reference the kind of excess policy issued by General Star.[5]

In response, Horace Mann points out that the language of its policy's other insurance provision expressly declares its coverage to be excess to coverage provided by policies such as that of General Star. Specifically, in the clause previously challenged by General Star as an escape clause, Horace Mann provides that its policy coverage will apply to any excess beyond amounts payable by "other valid and collectible insurance." The policy then defines "other valid and collectible insurance" to include "policies or insurance programs of self-insurance purchased or established by or on behalf of an **educational unit** to insure against liability arising from activities of the **educational unit** or its **employees**

regardless of whether or not the policy or program provides primary, excess, umbrella, or contingent coverage . . . ." Horace Mann contends that is exactly the kind of insurance policy General Star issued in this case.

The Court agrees. First, pursuant to the terms of Horace Mann's policy, General Star's additional insured, the Lincoln County Board of Education, qualifies as an "educational unit."[6] Next, pursuant to the mandate of West Virginia Code § 29-12-5a, the General Star policy satisfies the statutory requirement that the state provide excess liability coverage to the Lincoln County Board of Education for the covered actions of the Board's employees in their official capacities. Thus, the Horace Mann policy specifically declares its coverage to be excess to the kind of coverage issued by General Star to the Lincoln County Board of Education. Moreover, no specific declaration in the Horace Mann other insurance provision conflicts with the declaration that the policy's coverage is excess to "any and all other insurance policies."

* * * *

In summary, the Court finds that the language of both Horace Mann's and General Star's other insurance provisions is unambiguous. Further, in applying the plain and ordinary meaning of the words used in those provisions, the Court concludes that, as written, the coverage provided by Horace Mann's policy is unambiguously excess to the coverage provided by the policy issued by General Star.

ii. Arguments Based on Policy Type

The unambiguous language in the parties' policies notwithstanding, General Star argues that a structural difference in the parties' respective coverage schemes renders its policy excess to the Horace Mann policy. That difference relates to the kinds of coverage each policy is capable of providing, and not to the coverage actually provided by the terms of each policy. Specifically, General Star contends that its policy is a "true excess" or "umbrella" policy that can never provide primary insurance coverage, while Horace Mann's policy is a primary insurance policy that only becomes excess when certain conditions are met. As such, General Star asserts that the Court should apply the clear mandate of the so-called "Allstate Rule" to the facts of this case and declare the Horace Mann policy primary to its policy.

In *Allstate Insurance Co. v. American Hardware Mutual Ins. Co.*, 865 F.2d 592 (4th Cir. 1989), the Fourth Circuit Court of Appeals was tasked with determining the order of priority under West Virginia law of two secondary liability insurers, Allstate and American, following the payment of policy limits by a primary insurer, Continental, for damages arising from an automobile accident involving a vehicle "owned by Chrysler Corporation and leased to Greenbrier Motor Company, Inc." *Id.* at 593. American insured Greenbrier under a policy that provided primary liability coverage for garage operations, but only excess coverage in the event a "non-owned" vehicle was involved in a covered event. *Id.* at 593-94. By contrast, Allstate insured Chrysler under a policy providing "umbrella" coverage intended as excess to all other insurance policies held by Chrysler. *Id.* at 593.

As characterized by the court, "[t]he issue presented [was] the interplay and effect of the excess clauses contained in the two policies." *Id.* at 594. After noting that West Virginia courts had not decided the issue, and that the Fourth Circuit had no controlling precedent on point, the court looked for guidance to the case of *Allstate Insurance Co. v. Employers Liability Assurance Corp. Ltd.*, 445 F.2d 1278 (5th Cir. 1971).

In that case, the Fifth Circuit Court of Appeals had to determine the priorities of three competing secondary insurers after a primary insurer had paid its policy limits to cover damages arising from an automobile accident involving a leased vehicle. Two of the three competing secondary insurers had issued policies that provided primary liability coverage in most instances, but only excess insurance if a covered event involved a "non-owned" vehicle. *Allstate v. Employers*, 445 F.2d at 1283. The third insurer had issued an "umbrella" policy that "assumed only residual loss coverage in every event." Id. After looking to the "total policy insuring intent" of the parties, the Fifth Circuit concluded that the two policies that were "designed to provide a named insured with primary coverage," but which provided only excess coverage in the case at hand, had to absorb the loss on a pro rata basis and exhaust their policy limits before the umbrella insurer could be required to contribute. *Id.* at 1283-84.

The Fourth Circuit interpreted the Fifth Circuit's decision as adopting a rule that "primary policies with excess clauses must be exhausted before the carrier of an umbrella policy will be required to pay." 865 F.2d at 594. Further, after noting that the "Allstate Rule" had

been adopted in numerous state and federal jurisdictions, the court stated:

> It seems clear to us that the weight of authority holds that where purported conflicts exist between an umbrella policy and an essentially primary policy made excess by a non-ownership clause, the courts have held that the umbrella policy need not contribute until after the primary and ordinary excess coverages are exhausted.

Id.

Thus, "[s]ince American Hardware is in most instances a primary policy, its limits should be exhausted before Allstate is required to contribute." *Id.* at 595.

In seeking to apply the "Allstate Rule" here, General Star argues that, like the insurers who had issued "umbrella" policies in the Allstate cases, its umbrella policy only provides coverage for the Board of Education and its employees for the ultimate net loss in excess of the coverage provided by the underlying insurance; thus, it could never provide primary liability coverage. By contrast, the policy Horace Mann issued to Bell through the West Virginia Education Association provides primary liability coverage that converts to excess coverage only through the operation of its other insurance provision. Thus, General Star urges that this case is on all fours with the "Allstate Rule" and that Horace Mann, therefore, must exhaust its policy limits to cover Bell's liability before General Star's umbrella coverage can be triggered. The Court disagrees.

First, the decisions of the Fourth and Fifth Circuits adopting the "Allstate Rule" are factually distinguishable from the case at bar. They concerned claims filed against insureds whose policies covered vehicles involved in automobile accidents.[7] This is a sexual assault case involving school employees in their official capacity. Further, the policies in those cases were all rendered excess through the operation of "non-owned" vehicle clauses; otherwise, they were intended to provide primary coverage. In contrast, Horace Mann's policy was always intended to provide excess coverage to the umbrella insurance provided by General Star -- coverage that is part of a statutorily guaranteed package of insurance for education units and their employees in West Virginia.

Thus, both the facts and the "total policy insuring intent" of the polices involved in this case differ from those in the "Allstate" cases. Although both the Horace Mann and General Star policies cover educators, only one, the General Star policy, is part of a mandated package of insurance provided by law to West Virginia public schools and their employees. Moreover, unlike the policies containing "non-owned" vehicle clauses in the Allstate cases, Horace Mann's policy is not intended to be a primary policy. Indeed, its policy language unambiguously makes its coverage excess whenever any other insurance covers the liability, no matter what the circumstances. It cannot be overemphasized that, here, those circumstances include General Star's obligation under West Virginia law to cover the Board of Education of Lincoln County and its employees for liability arising from the sexual assault that occurred at DuVall High School during the 2002-2003 school year.

In that year, W. Va. Code § 29-12-5a required the Lincoln County Board of Education, through the Board of Risk and Insurance Management, to carry a package of insurance with minimal limits of one million dollars of primary coverage and five million dollars of excess coverage. The interplay and effect of that insurance package was to cover "any claim, demand, action, suit or judgment by reason of alleged negligence or other acts resulting in bodily injury or property damage to any person within or without any school building . . . if, at the time of the alleged injury, the teacher, supervisor, [or] administrator, . . . was acting in the discharge of his duties, within the scope of his office, position or employment." Id. Thus, it was pursuant to a clear statutory mandate defining its responsibilities and the scope of its coverage that General Star provided umbrella coverage to the Lincoln County Board of Education and its employees.

West Virginia law, moreover, required the Board not only to purchase that insurance, but also to indemnify its employees for damages arising out of their employment.[8] As a school principal in the Lincoln County public school system, David Bell, therefore, was protected under this comprehensive, two-tiered scheme. By contrast, Horace Mann insured Bell through his voluntary membership in the WVEA with an additional layer of coverage that was intended to be "excess of any and all other insurance policies." That policy was never designed to provide primary coverage "in most instances," but, under the facts here, to cover a judgment beyond the limits of the Board's primary and umbrella coverage. Thus, when viewed "in the light of total policy insuring intent," Allstate v. Employers, 445 F.2d at 1284, the Court holds that West Virginia law

does not support the application of the "Allstate Rule" in this case, and concludes that General Star's policy limits must be exhausted before Horace Mann has any obligation to contribute its coverage.

iii. Arguments Based on West Virginia Code

Because the Court's holding rests on other grounds, it need not address further Horace Mann's alternative argument based on a political subdivision's statutory duty to indemnify its employees for damages arising from their employment under West Virginia law.

IV. Conclusion

For the foregoing reasons, the Court **GRANTS** Horace Mann's motion for summary judgment, (Doc. No. 22), **DENIES** General Star's motion for summary judgment, (Doc. No. 23), and **DECLARES** that the coverage provided by the Horace Mann policy is unambiguously excess to the coverage provided by the General Star policy.

It is so **ORDERED.**

The Clerk is directed to transmit copies of this Memorandum Opinion and Order to counsel of record.

DATED: September 29, 2006.

/s/ IRENE M. KEELEY

UNITED STATES DISTRICT JUDGE

[1] Policy No. 612-53-97.

[2] Policy No. NXG-358846D.

[3] National Union is not a party to this action, and it is undisputed that National Union's policy provided the primary liability coverage for the underlying claims.

[4] Policy No. 47-006047.

[5] To wit:

> This policy is specifically excess over coverage provided by school district or school board errors and omissions or general liability policies purchased by the Insured's employer or former employer and it is specifically excess over coverage provided by any School Leaders Errors and Omissions Policy purchased by the Insured's employer or former employer and it is specifically excess over coverage provided by any policy of insurance which purports to be excess to or recites that it is excess to a policy issued to the Insured for the benefit of members of the National Education Association. . . .

[6] Horace Mann's policy provides that:

> The term "Educational Unit" means a school district; a college or university; a state department of education; . . . any other institution which has as its primary purpose the instruction of students, a department or other administrative unit of a governmental entity which does not have as its primary purpose the

> instruction of students, if the primary purpose of the administrative unit is the instruction of students; or a state board or commission which has as its primary purpose the licensure or certification of educators or the setting of standards for such licensure or certification.

[7] The same holds true for the Fourth Circuit's recent unpublished decision in *Cont'l Cas. Co. v. Penn Nat'l Ins. Co.*, 128 Fed. Appx. 957, (4th Cir. 2005), which General Star cites as an example of the continuing validity of the "Allstate Rule". Like both the Fourth and Fifth Circuits' decisions, Continental applied the "Allstate Rule" to a policy containing a "non-owned" vehicle provision.

[8] Pursuant to West Virginia Code Section § 29-12A-3, the Lincoln County Board of Education is a political subdivision, which, under West Virginia Code Section § 29-12A-11(a)(2), must "indemnify and hold harmless an employee in the amount of any judgment . . . that is for damages for injury, death, or loss to persons or property caused by an act or omission of such employee."

Filed: 2/20/2008
No. 06-2156
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

HORACE MANN INSURANCE COMPANY,
Plaintiff-Appellee,

v.

GENERAL STAR NATIONAL INSURANCE COMPANY,
Defendant-Appellant.

ORDER

The Court denies the petition for rehearing and rehearing en banc. No poll was requested on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Niemeyer, Judge Traxler, and District Judge Wilson.

Filed: 2/20/2008
No. 06-2156
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

HORACE MANN INSURANCE COMPANY,
Plaintiff-Appellee,

v.

GENERAL STAR NATIONAL INSURANCE COMPANY,
Defendant-Appellant.

ORDER

The Court denies the petition for rehearing and rehearing en banc. No poll was requested on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Niemeyer, Judge Traxler, and District Judge Wilson.

Filed: 2/28/2008
No. 06-2156
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

HORACE MANN INSURANCE COMPANY,
Plaintiff-Appellee,

v.

GENERAL STAR NATIONAL INSURANCE COMPANY,
Defendant-Appellant.

CORRECTED ORDER

The Court denies the petition for rehearing and rehearing en banc. No poll was requested on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Niemeyer, Judge Traxler, and District Judge Wilson. Judge Niemeyer voted to grant the petition for rehearing.